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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JULIE FISHER

PETITIONER,

VS.

YVONNE LARSEN, W. DANIEL LARSEN, JOSEPH HARMON, EDWIN GRAY, MICHAEL SCOTT-BLAIR, AND COPLEY PRESS INC.

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

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PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the First and Fourteenth Amendments require that states abandon their common law to provide protection, greater than that guaranteed by the actual malice rule, for press defendants in public person defamation suits.

A. Did this Court, in the Gertz decision, determine that libel actions based on statements of opinion are constitutionally impermissible?

B. Must states immunize media defendants from defamation actions based on attributed, newsworthy, republished libels?

II. Whether the First and Fourteenth Amendments prohibit states from

extending absolute immunity to press defendants in public person defamation actions where actual malice is shown.

III. Is Section 48a of the California Civil Code unconstitutional?

LIST OF ALL PARTIES

All parties to this cause appear in the caption of the case in this Court.

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The opinion of the California Court of Appeal, Fourth Appellate District, Division One, has been officially reported at 137 Cal. App. 3d 627.

It is copied into the appendix.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS BASED

A. Petitioner seeks review of the judgment of the Court of Appeal, State of California, Fourth Appelate District, Division One, entered on March 25, 1983. The decision of that Court was filed Dec. 24, 1982. A timely petition for a rehearing was denied without modification of the opinion.

A timely petition for a hearing, raising all matters urged here was rejected by an order of the California Supreme Court issued March 23, 1983.

B. The highest Court of the State of California has finally determined the federal issues presented in this case. These questions will survive regardless of the outcome of future state court proceedings.

C. Petitioner relies upon 28 U.S.C. paragraph 1257(3) to confer jurisdiction on the Court to review the judgment of the Court of Appeal.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

1. **United States Constitution Amendment I:** "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of people...to petition the Government for a redress of grievances."

3. **United States Constitution Amendment XIV:** "No State shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED IN THE CASE

4. **California Civil Code section 48a, subdivision 1:** "In any action for damages for the publication of a libel in a newspaper....plaintiff shall recover no more than special damages unless a correction be demanded and be not published... as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication...., a written notice specifying the statements claimed to be libelous and demanding the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication...of the statements claimed to be libelous."

STATEMENT OF THE CASE

The articles at issue appeared in the news columns of the San Diego Union during 1977. They are included in the Appendix along with the two columns published on the editorial page which contain the Union's Readers' Representative's analysis of some of the disputed stories.

Relevent procedural history relating to those publications adjudged to contain only constitutionally protected statements of opinion.

The trial Court sustained three of the press defendants' (Copley Press Inc. and reporter Michael Scott-Blair) demurrers. The Appellate Court affirmed.

Both courts accepted defendants' contention that statements of opinion are not actionable regardless of their defamatory impact.

That argument was based on the California Supreme Court's interpretation of a portion of the Gertz decision.

"An essential element of libel..is

> that the publication in question must contain a false statement of fact. As expressed by the United States Supreme Court:..Before the test of reckless or knowing falsity can be met, there must be a false statement of fact" ..This requirement...is constitutionally based. The reason for the rule, well stated by the high court, is that 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." ..In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse."(Gregory v. McDonnel Douglas Corp. 17 Cal. 3d 596)

This was followed in the cases cited by the Appellate Court.

The Appellate Court also relied upon Miami Herald vs. Tornillo.

Petitioner had argued that the prominance of display of the contested articles, including headline size and location within the paper, should be considered when determining if the articles were defamatory.

Defendant Copley responded that such consideration:

> "would have this court play the role of an editor determining the page on which articles should be placed and the size of headline that should be used. Such an intrusion into the editorial function would clearly violate the First Amendment. In Miami Herald...the Supreme Court concluded:
> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment.""

This portion of Miami Herald is cited in the Appellate Court's decision:

> "The sixth cause of action alleges an article entitled JULIE FISHER CAMPAIGN CLAIMS DENIED BY OTHERS, (Appendix 29) published in the San Diego Union reasonably can be understood in the context of the article as calling her a liar. However, campaign claims are often vigorously denied.....The article contains no actionable defamation."
>
> "In her tenth cause of action (Appendix 33) Fisher attacks the San Diego Union article entitled BOARD PRESIDENT RAPS FISHER ELECTION PLOY...(The) statements are clearly opinion and the court properly determined they were not action able

"The fifteenth cause of action concerned an article published just before election entitled SCHOOL BOARD EX-PRESIDENTS FAULT FISHER. Fisher admits 10 school board ex-presidents supported her opponent, but claims the story was overplayed. The newspaper, AFTER ELECTION, editorially admitted (Appendix 45) it overemphasized the article and admitted failing to comply with general fair-reporting practices and its own reporting policy by not contacting Fisher for her response BEFORE publication. However, the article is factual, newsworthy in the context of the political campaign, and fully protected under the guarantees of the First Amendment.(See Miami Herald ...)" (See Appendix 40-A)

Relevent procedural history relating to publications adjudged non-actionable because the libelous statements were correctlly attributed to others.

Three of the press publications for which petitioner filed suit were based on political news releases.

The trial Court initially overruled the demurrers relating to both the news releases and the articles. However, comments of the Court indicated that the statements were later determined to be non-actionable

statements of opinion (Appellant's Brief pgs. 74-78), and defendants' motions for summary judgments were granted. The Court did not indicate that there was insufficient evidence of actual malice.

The Appellate Court reversed the summary judgments as they pertained to the publishers of the news releases, but affirmed the summary judgments for the newspaper that republished the same libels. During oral argument one of the Justices asked petitioner if the Federal rule would not prohibit an action against a newspaper based on an accurately quoted libelous statement.

The portion of the Appellate Court's decision dealing with these articles does not contain any citations. However, in its discussion of the first article, the Court uses the terminology that is often included in those jurisdictions that have adopted a constitutionally based 'neutral report' privilege.

> "The third cause of action accuses Copley Press and Scott-Blair, (See Appendix 19)

> of defaming Fisher by reporting Yvonne Larsen's press conference, including her question, "Do the taxpayers like it when Julie Fisher appears at Union rallies and supports their demands?" Although the pleadings fault this report as unfair and false, the evidence shows it accurately reports an announcement of candidacy in one of the city's most newsworthy political races. It is clearly fair and neutral reportage of a news event allowing no inference the press was giving credence to the premise contained in Larsen's isolated question, nor undue emphasis upon that remark in context of the entire article. Absent an inference of malice, the trial court properly granted summary judgment on this cause of action."

The Court went beyond the 'neutral report' privilege and recognized immunity for publication of attributed libels unfairly published with actual malice.

> "The seventh cause of action (Appendix 31) complains of the news story (commencing on the FRONT page of the San Diego Union's local section and continuing on page 4) reporting Larsen's October 24th speech and press release under the heading "School Candidate Larsen Accuses Fisher of Blackmail." Fisher does not claim the article is literally inaccurate. (It merely quotes Larsen's general charges of blackmail and perjury which are the subject of the fifth and

sixth causes of action without embellishment or editorial comment). However, she faults the press for unfairly distorting its coverage of the event at which the charges were made by displaying her political opponent's unproved charges of criminal conduct in the headlines, featuring the attack in the lead paragraphs and burying Fisher's rebuttal. One who reads only the headlines and lead paragraph would never know Fisher also appeared and spoke in the same forum. The San Diego Union admits this news coverage was unfair, as was its coverage of other stories highlighting accusations against Fisher, while omitting or minimizing defalcations of others. An editorial MEA CULPA published AFTER the election describes its coverage of the last week of Fisher's campaign as a 'blitz of negative stories,' characterized by 'bumbling non-actions and non-professional operations." However, no matter how unfairly the article was presented and how cursorily it is read, it is not false. Even the headlines and the lead paragraphs accurately attribute the public accusations to Larsen, a political candidate. Therefore, even though elements of actual malice potentially lurk in this scenario, there is no triable issue on whether the publication is false. Summary judgment was proper."

Relating to California Civil Code 48a.

The Court accepted defendants' argument that it would be almost impossible for a

candidate to meet the burden of showing special damages due to libel during a campaign.

> "The fourth and fifth causes of action (See Appendix 59, 62, 106) challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles, she only seeks to recover the 'special damages limited to loss of future income and benefits of her lost elective office. Since we hold these damages are not recoverable, summary judgments ...were proper."

FACTS

General Background. In 1977 the San Diego Union was San Diego's only morning daily newspaper. Together with its companion afternoon Copley Press paper, it provided San Diego's only metropolitan news coverage.

Petitioner was a public official seeking re-election to the governing board of California's second largest school district. The district had just experienced its first major teachers' strike. Earlier in the

year a new California law recognizing collective bargaining for teachers took effect, and the question of how tough or conciliatory the Board of Education should be in dealing with teachers was a 'hot' issue in the community.

Petitioner favored a concilliatory approach and was one of a 3 to 2 majority voting to grant amnesty for teachers who went out on strike.

The Superintendent, Board President and San Diego Union were among those who strongly supported taking a harder line. The Union editorialized:

> "..The support by three members of a no reprisal policy as the cost of getting teachers to obey the law, is bound to be an issue in the election this fall...That election is already shaping up as one that will be crucial to the direction of the San Diego school system in a period that is likely to be marked by increasing union militancy.(AB118)"
>
> "We have just seen a 3-2 majority ..pursue a policy that offers

Note: AA refers to Appellant's Appendix A refers to the appendix to Appellant's Opening Brief.

little discouragement to strikes at all...within a few months San Diego voters will have their first chance to register their reaction to the School Board's performance"

"In District C the issue is Julie Fisher who has been a solitary and disruptive force on the Board ...Her one-sided commitment to the teachers union was reflected in her amnesty vote and in some bizarre behavior during the school strike."

"In Mrs. Fisher (it is) a sympathy with teachers that clouds her judgment.."

About a month before the election the publisher warned of teacher militancy:

"No longer satisfied with one of the most feared and effective lobbying groups in Sacramento and Washington, militant teacher groups are now aiming at nothing less than control of local school boards by electing teacher advocates. This is an arrogant subversion of the public's interest, and unless checked, it will prove fatal to public education."
"An adversary relationship between the Board and District employes is necessary and proper unless the taxpayers are willing to give teacher unions a signed blank check."

ACTUAL MALICE

1. Fisher testified that from June through November of 1977, Union articles carrying Michael Scott-Blair's byline contained over a dozen statements which were falsely attributed to Fisher, each of which was enclosed in quotation marks indicating that it was a direct quote of Fisher.(A-81-90)

2. Petitioner's testimony states that prior to the publication of the libels cited in the original complaint, for each of the statements, she had at least one conversation with Scott-Blair or there was at least one meeting which they both attended during which the truth regarding the subject matter was clearly stated.

3. Scott-Blair, in his deposition, stated that he had routinely destroyed his notes of the 1977 campaign and that he did not remember any of the interviews or meetings which were reported. He testified that he had no independent recollection that

would contradict petitioner's testimony pertaining to their conversations.

He said that Fisher had told him that she opposed teachers' strikes, that he never reached the conclusion that Fisher was in favor of the teachers going out on strike, and that his August 31 article (Appendix 21) was not intended to imply that Fisher supported the strike.

Blair testified tha the 'marching' statement was based on his observation that Fisher's path as she walked from her car into the Education Building was not a straight line, that she appeared to walk along with some of the teachers -- along the legs of a triangle rather than what would have been the 'hypotenuse of that triangle, the straight line path from her car to the door. He said that he didn't check the files for pictures taken of Fsisher's 'walk' before writing the September 21 marching story and that such a check would have taken less than 15 minutes.

When asked if he remembered Fisher offering to play for him the portion of the tape of the July 19 Board of Education meeting about the mandatory nature of the integration program, her said "I recall a conversation with Mrs. Fisher pertaining to a tape, but I don't know if that was the circumstance." (A-91-125).

4. The testimony of Beatrice Andalaft and Fisher states that between June 20, 1977 and October 21, 1977, Union Editors were repeatedly notified of the falsity of statements the Union was printing about Fisher. Andalaft and Fisher made two complaints directly to the publisher, five directly to Editor Warren, four to the readers representative, Alfred JaCoby, one to Editor Zumwalt, and one to Editor Zimmerman. In addition, Fisher was interviewed by the Editorial Board of the Union late in August.

On 11 of these occasions Union officials were notified of specific false statements

published in the Union about Fisher. Petitioner's first request for retraction of a particular defamatory falsehood was made directly to Editor Warren on June 20, 1977 (#15, B-36). Fisher did not comply with the requirement that requests for retraction be in writing as dictated by CC48a, until after the election.

6. Alfred JaCoby testified that he investigated the truth of the statement printed in the Union on September 21, 1977, "Fisher marched with striking teachers." He viewed unpublished pictures of Fisher walking from her car into the Education Building on June 9, 1977, telephoned Fisher and interivewed three reporters who were present at the time of the incident. JaCoby deterimined from his investigation that the statement was false and so reported in his article titled Uplavchi Syndrome. The article, published on October 17, 1977, three weeks before the November 8 election (Appendix 43)(A-126-129)

7. According to their deposition testimony, Union Publisher Helen Copley, Union Editor Gerald Warren and Union Associate Editor Peter Kaye read the Uplavici column when it was publiahed (A-166-167, A-189, A-210-211)

8. The Union published six of the articles for which petitioner filed suit after the publication of the Uplavici column. (Appendix 29-41)

9. Marion Dreshler, a Copley International Executive, testified that Copley International, which in 1977 was a subsidiary of Copley Press, conducted a poll 8 to 10 days before the November 8 election. The computer printout, listing the results, which is appended to her deposition, shows that Fisher was leading Larsen by a substantial margin with every category of voter.

Peter Kaye stated in his deposition, that partial results of that poll were published in the Sunday Nov. 6 Union.

10. Editor Gerald Warren in his deposition stated that, in the Union, the location of greatest prominance for a local news story is the upper right hand corner of page B-1, the first page of the local section of the paper.

The three articles for which the demurrers were sustained, headlined JULIE FISHER CAMPAIGN CLAIMS DENIED BY OTHERS, BOARD PRESIDENT RAPS FISHER ELECITON PLYOY, and BOARD EX-PRESIDENTS FAULT FISHER, were each given a headline larger in size than any headline pertaining to any other candidate during the entire 1977 campaign. In relation to the sizes of headlines for articles covering other candidates, which appeared in 1977, the three Fisher headlines named above were 3.5, 10 and 4.75 standard deviations above the mean respectively. In other words, the odds against the CAMPAIGN CLAIMS article being played with the same prominance just by chance were roughly 3000 to 1. As for

the PLOY article, it would have been much more likely for petitioner to have been accidentally hit by lightning than to have been accidentally hit by a headline whose size deviated so greatly form the norm.

Petitioner compiled a listing of all San Diego Union headlines covering municipal candidates (City Council, Board ofEducation and City College Board) during the last two weeks of each campaign from 1967 through 1977. Of the 200 headlines covering the 10 year period, only three of them named a candidate and were located in the upper right hand corner of page B-1, the front page of the local section. The three were BOARD PRESIDENT RAPS FISHER ELECTION PLOY, PUPIL PRIVACY LAW BROKEN BY FISHER SCHOOL AIDE SAYS, and SCHOOL BOARD EX-PRESIDENTS FAULT FISHER.

Of the 200 headlines during the 10 year period, 15 conveyed a derogatory message about a particular candidate named in the

headline itself. Those headlines and their locations in the paper are listed as follows:

MAYOR CALLS CLAIM BY MORROW FALSE (1973, B-3 bottom middle)

CANDIDATE AIMS REBUFF AT MAYOR (1973, B-3, bottom middle)

SCHOOL CANDIDATE LARSEN ACCUSES FISHER OF BLACKMAIL (1977, B-1, middle)

FISHER ACCUSED BY LARSEN OF 'OUTRIGHT BLACKMAIL' (1977, B-4, middle)

SCHULTZE PROTESTS CLAIM BY STERLING (1977, B-3, bottom middle)

MITCHELL CRITICIZES JOHNSON STATEMENT OF QUALIFICATION (1977, top right)

OPPONENT ASSAILS FISHER AD ON TV (1977, B-4, middle left)

BOARD PRESIDENT RAPS FISHER ELECTION 'PLOY' (1977, B-1, top right)

FISHER CRITICIZED FOR ELECTION PLOY (1977, B-4 top right)

LOAN MADE TO MORROW QUESTIONED (1977, B-4 middle)

SCHULTZE TO STIRLING: RETURN DONATION (1977, B-3 bottom middle)

PUPIL PRIVACY LAW BROKEN BY FISHER, SCHOOL AIDE SAYS (1977, B-1 top right)

FISHER BROKE PRIVACY LAW AIDE SAYS (1977, b-4 top right)

EX-BOARD PRESIDENTS FAULT FISHER (1977, B-1 TOP RIGHT)

EX-BOARD LEADERS FAULT FISHER (1977, B-10, top left)

During the ten year period in which the 200 headlines appeared, there were 101 candidtes.

If 15 headlines were randomly (or carelessly) distributed among 101 candidatwes, the probability that 9 of the 15 would be 'carelessly' assigned to one candidate is 4.31×10^{-27}. It is likely to happen once in 23,196,541,652,000,000,000,000,000,000 tries. There were 17 candidates in the November 1977 San Diego municipal election. If one assumes th the 'carelessness' claimed by Copley Editors was limited to one year,

1977, then the probability of randomly assigning 9 out of 13 headlines to one of 17 candidates is 7.22×10^{-14} or likely to happen once in 13,852,556,690,000 tries, less than one time out of 13 trillion.

11. Scott-Blair stated in his deposition that he did not make the decisions as to where in the Union his stories would be located or as to the wording or size of the headlines.

In their depositions Editors Warren and Kaye described the usual process for determining the 'play' of a story as one that involves many persons at various levels.

Warren stated that whether or not a story is defamatory is "considered at every level" (A-135-146).

12. Karin Winner, Scott-Blair's immediate supervisor, testified that the Fisher-Larsen campaign was her responsibility and that she had no recollection of any investigation as to the truth of statements published

by the Union about Fisher.

She didn't remember if any employee of the San Diego Union ever checked the factual accuracy of any of the articles. (A-147-159)

Peter Kaye, Associate Editor of the Union, stated in his deposition, that he had no knowledge of any facts supporting any of the defamatory statements published by the Union about Fisher, and he knew of no attempt by any Union employee to determine prior to publication if any of the statements were true.

Editor Warren stated in his depostion that he had no knowledge of any facts supporting any of the defamatory statements published in the Union except for the statement contained in the Septemer 21, 1977 article that Fisher had attempted to discredit the administration's integration plan. He also stated that he had no knowledge of any attempt by any Union employee to determine if any of the statements made about or by Fisher were true. (A-160-185).

13. Scott-Blair testified that he was not told by any editor during the Fisher-Larsen campaign, that his stories were biased or unfair to Fisher.

Editor Warren and Associate Editor Kaye both stated during their depositions that they did not recall discussing with Scott-Blair any of the articles pertaining to the Fisher-Larsen campaign.

Kaye said he knew that an investigation of the coverage was conducted at some time but he couldn't remember if it was before or after the election (A-186-192).

Publisher Copley testified that it is Union policy to send retraction requests coming from lawyers to the Union's lawyer, and that she knew of no record kept of retraction requests that do not come from lawyers.

She said that the decision as to whether or not a retraction is printed is left to the editor and the Union attorneys.

When questioned about Fisher's formal requests for retraction, Publisher Copley

testified that she didn't remember any of them.

Associate Editor Peter Kaye testified that the Union has a different procedure for processing requests for retractions coming from lawyers than from others, and that what happens to requests from non-lawyers varys.

Scott-Blair testified that he was not informed by anyone of the San Diego Union that Fisher had asked for retraction of some of the articles he had authored.

Editor Warren stated in his deposition that he saw Fisher's requests for retraction, however, he didn't remember what was done with them. (A-216-228)

ARGUMENT

I. THIS COURT SHOULD REVIEW THE STATE COURT'S DECISION RECOGNIZING CONSTITUTIONALLY BASED EXEMPTIONS FROM LIABILITY FOR STATEMENTS OF OPINION AND FOR REPUBLISHED ATTRIBUTED LIBELS BECAUSE IT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, IT IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND BECAUSE IT IS A DECISION ON A FEDERAL QUESTION WHICH IS IN CONFLICT WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

A. Under California common law there is a conditional but no absolute privilege for defamatory statements of opinion.

The California Supreme Court stated,

> "Statements of opinion, although of a defamatory nature, are privileged in California under section 47 of the Civil Code."
> "But this defense of fair comment is not absolute. There is no absolute right to destroy a person's name and reputation by publication of defamatory criticisms and opinions"(Maidman v. Jewish Pub., 7 C. Rptr. 621)

B. This Court has not created an absolute privilege for defamatory statements of opinion nor has it removed statements of opinon from the realm of actionable defamation

The argument that the Times decision

and its progeny require the elimination of all defamation actions by public person plaintiffs if they are based on expressions of opinion, is not substantiated by those decisions.

1. The Times decision did not alter the conditional nature of the fair comment privilege.

In Times vs. Sullivan, this Court clarified the relationship between the constitutional privilege announced in that decision and state privileges of fair comment.

Footnote 30 states that the fair comment privilege holds for comments based on facts believed to be true as well as for true facts.

> "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice." (New York Times vs. Sullivan, 376 U.S. 292)

There is no indication that this Court

intended to alter the conditional nature of the fair comment privilege. A careful reading of the decision can only lead one to conclude that this Court sought to put aside preoccupation with the fact-opinion distinctions and concentrate on the question of culpability.

2. The Gertz decision did not exempt opinions from libel actions.

The sentence from the Gertz decision, relied upon as authority for exempting opinions from libel actions, cannot reasonably be interpreted as making such a vast change in libel law.

> "The judge quoted a passage from Justice Powell's opinion for the Court in Gertz, which has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."
>
> "Justice Powell's very next sentence however, was that ' there is no constitutional value in false statements

of fact.' The alleged libels in Gertz which were deemed sufficiently 'factual' to support an action for defamtion, included an implication that petitioner had a criminal record' and charges that he was a 'Leninist' or 'Communist fronter'. The sort of idea which can never be false was illustrated by reference to Thomas Jefferson's inaugural Address, where the President argued for freedom for those who would wish to dissolve this Union or change its republican form."(Cianci vs. New Times 639 F.2d, 61, 62)

"While allegations referring to a person's motives may suffer from a certain indefiniteness, a defamation action may be brought in appropriate circumstances. A speaker is not accorded free speech protection for attacks on an individual's reputation interests by framing the attack as 'opinion'. Neither Gertz nor Bucher have eliminate all defamation actions based on allegations concerning matters of motive, integrity, and political characterization." (Burns vs. Mc.Graw-Hill, Colorado Supreme Court, 81 SC 121,2-22-83)

"The problem of defamatory opinion was not remotely an issue in Gertz and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem. I am confident this court did not intend to wipe out this rich and complex history with the two sentences of dicta in Gertz quoted above." (U.S. Supreme Court 81-2407, Rehnquist and White dissenting)

C. This Court should clarify that 'pure opinions', as defined by the Restatement of Torts, are not actionable only because they are not defamatory.

There are two understandable misconceptions from which the conclusion that the constitutional privilege announced in Times somehow dictates the exemption of all opinions from defamation actions might follow.

First is the notion that defamatory statements of opinoin must inevitably receive more protection than defamatory statements of fact, and second is the confusion between merely derogatory statements of opinion and those that are also defamatory.

Prior to the Times decision, it was axiomatic in an overwhelming majority of the states that libelous statements of fact were and should be punished more severely than libelous statements of opinion. If the Times decision is interpreted as incorporating this fact-comment axiom, and then effecting an across the board reduction in the interest in reputation, then it follows that liability for misstatements

of fact must necessarily be greater than liability for defamatory opinioins. Thus if defamatory statements of fact are to be conditionally excused, as required by the Times decision, then defamatory opinions must be unconditionally excused.

The fallacy lies in the assumption that the Times decision and its progeny reduced the interest in reputation while maintaining the relationship previously established in majority states between fact and opinion. It would be most beneficial if this Court would reaffirm that Times did neither; that the constitutional privilege focuses on culpability and away from fact-opinion determinations; that it altered the internal structure of libel law, placing honest misstatements, whether of fact of opinon, in one category, and defamations resulting from culpable conduct in the other. While the former is to be tolerated in the interest of public debate, the latter is not.

The other misconception is the confusion

between statements that are derogatory and those that are defmatory. This is caused by inadequate attention to the context in which a statement is made.

It was recognized, long before the Times decision, that when derogatory opinions are clearly represented as inferences from true facts, they will most likely lost their defamatory sting. This was expressed in 1890 by the Michigan Supreme Court.

> "When the facts are truthfully written or spoken of a candidate's character and conduct they then become known to the reader and hearer, as well as to the writer and speaker...the criticism thereon, if unjust, will fall harmless, for the former furnishes a ready antidote for the intended poison. Readers can then determine whether the writer has by the publication libeled himself or the candidate." (Belnap v. Ball, Michigan 188, 1890)

The word opinion in this sense has been used in some decisions to mean statements which, if taken out of context would be defamatory, however, when taken in context

can only be understood as conveying a message about the maker of the statement and not defaming the subject of the statement. These opinions have of course been adjudged non-actionable.

The disputed statements in this Court's Greenbelt and Letter Carriers decisions exemplify this type of opinion.

The Restatement of Torts definition of 'pure opinion' establishes an algorithm which is generally valid for determining if a statement is in this category. According to the Restatement, if the facts upon which the derogatory statement is based are stated or are known to the recipient of the communication, then the statement is one of 'pure opinion', and not actionable. The reasoning is the same as contained in the 1890 Michigan decision quoted above. If a comment is made upon stated facts, that comment will most likely reflect on the speaker rather than defamae the subject.

Some other courts have also taken into

consideration whether the statement is within the bounds of what's expected for the situation and whether there is opportunity to respond effectively.

All of these are factors that should be considered when determining if the statement is defamatory.

This Court should clarify that the opinions that are exempt from defamation actions form a subset of those statements that are not defamatory. Opinions that are defamatory, such as those in this case - that seriously injure reputation - remain conditionally privileged. To hold otherwise is to ignore the injury and concentrate on the weapon. This Court did not create an exemption from liability based on the'weapon' used to inflict an injury. That would be like creating an exemption for murderers as long as they used some particular weapon to commit the murder.

The misconceptions surrounding the 'opinon' issue are serious. They warrant review of this decision.

II. There is no constitutional basis for exempting media defendants from liability for republishing libels with actual malice.

A. According to common law, including that in California, a person is ordinarily subject to liability not only if he originates a defamation but also if he repeats a libel or slander originally published by another.

> "Repetition of a defamatory statement is a publication in itself, regardless whether the repeater names the source.. The repeater cannot defend on the ground of truth simply by proving that the source named did, in fact, utter the statement. (Olinger v. American Savings and Loan Association, U. S. District Court Of Appeals, District of Columbia, 409 F. 2d 144)

> "One may not escape liability for defamation by showing that he was merely repeating defamatory language used by another person." (Cepeda v. Cowles Magazines and Broadcasting, 328 F. 2d. 871)

B. The constitutional privilege announced in the Times decision does not distinguish between publisher and re-publisher; both are liable if they publish with actual malice.

The libelous statement in St. Amant vs. Thompson was read verbatim by the defendant, who mistakenly believed he had no responsibility because he was merely quoting another. This Court considered that fact only as it related to the defendant's possible knowledge of falsity or reckless disregard as to the truth of the quoted statement.

> "St. Amant's mistake about his probable liability does not evidence a doubtful mind on his part."(St. Amant vs. Thompson, 390 U.S. 733)

The commnon law rule has been followed in post-Times decisions even in cases with media defendants.

> "The republication of false defamatory statements is as much a tort as the original publication." (Dixon v. Newsweek, U.S. Court of Appeals, Tenth Circuit, 1977, 562 F. 2d, 631)

C. A doctrine of neutral report, restricted to reports prepared in accordance with strict standards of fair reporting, has been adopted in some jurisdictions and rejected in others.

In 1977 the Second Circuit defined a constitutional privilege protecting the press from liability for accurately reporting 'newsworthy' defamatory statements even when the reporter has serious doubts as to the truth of the statements. This is commonly called the Edward's 'neutral report' privilege. Some state courts have flatly rejected it.

> "In Edwards v. National Audobon Society, Inc. the Court of Appeals granted the press absolute immunity from liability for accurately reporting 'newsworthy' statements regardless of the press' belief about the truth of the statements. This doctrine has not been approved by the Supreme Court of the United States and has not received approval in other jurisdictions. We reject the doctrine." McCall v. Courier-Journal, Kentucky Supreme Court, 1981, 7 Media Law Rptr. 2121)

> The theory behind the rule of fair report is that the publisher acts as the agent of the public,

reporting only that which others could hear for themselves were they to attend the proceedings. It has also been justified on policy grounds because the public has supervisory or oversight responsibilities over public bodies and officers. Normally the common law privilege does not extend to non-governmental proceedings because the public has no oversight responsibility for their conduct."

"In Edwards v. National Audubon Society the court expanded this common-law rule of fair report..It immunized the publication of defamatory falsehoods even though they may be known to be such by the publisher by creating a special category of absolute privilege for attributed quotations. There was no agency or oversight justification for applying the common-law fair report privilege in Edwards..The privilege was extended and given constitutional status solely because the court perceived informational value to the public in the publication of the charges; they were newsworthy."

"Presumably, all publications of the news media are newsworthy. They are not privileged, however, unless the publisher is free of culpable conduct under the standards stated in New York Times." (Hogan v. Herald Co., N.Y. Supreme Court Appellate Div. Fourth Dept. Jan. 1982, 8 Med. L. Rptr. 1140)

D. This Court should reject the neutral report privilege.

In this Court's most recent ruling on a request for greater portection for media libel defendants than that afforded by the actual malice standard, it was rejected and the actual malice standard reaffirmed.

> "It is urged that the balance struck in New York Times should be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation... In the 15 years since New York Times,the doctrine announced by that case, which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures."(Herbert vs. Lando, 4 Med. L Rptr. 2582)

This Court has been unequivocal in asserting that there is no First Amendment interest in protecting statements made with actual malice.

> "If the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what New York Times and other cases have held to be consistent with the First Amendment. Spreading false information in

> in and of itself carries no First Amendment credentials."
>
> "Those who publish defamatory falsehoods with the requisite culpability, are subject to liabiltiy, the aim being not only to compensate for injury but to deter publication of unprotected material threatening injury to individual reputation." Herbert v. Lando, 441 U.S. 170)

The 'neutral report' privilege appears to be inconsistent with this Court's decisions. The expanded version of the 'neutral report' privilege accepted by the Appellate Court in this case is even more at odds with this Court's decisions. It should be reviewed.

II. WHETHER THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT THE STATE COURT IN THIS CASE FROM EXTENDING ABSOLUTE IMMUNITY TO THE MEDIA DEFENDANT FOR PUBLISHING DEFAMATORY STATEMENTS OF OPINION OR FOR REPUBLISHING LIBELS WITH ACTUAL MALICE SOLELY ON THE BASIS OF STATE LAW, IS AN IMPORTANT QUESTION OF FEDERAL LAW AND SHOULD BE REVIEWED BY THIS COURT.

It is erroneous to assume that constitutional interests in freedom of speech and press and the publics' right to receive information must necessarily weigh against the plaintiff in a public person libel action.

A. Reputation is an implied First Amendment right. This Court has recognized rights that are implied by but are not stated in the First Amendment.

> "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are, nonetheless necessary to the enjoyment of other First Amendment rights." (Globe Newspaper v. Superior Court, 8 Med. L. Rptr. 1693)

Reputation is indispensible to the enjoyment of other First Amendment rights. This Court recognized reputation as basic to the enjoyment of all other rights.

> "The individual's right to the

> protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty" (Gertz v. Welch, 418 U.S. 341)

This Court also recognized that First Amendment speech rights extend to candidates,

> "If it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, then it can hardly be doubted that the constitutional gruarantee has its fullest and most urgent applicaiton precisely to the conduct of campaigns for political office. The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite the contrary, the candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues." (Brown v. Hartlage, U.S. Supreme Court, April 1982)

Petitioner's description of the manner in which her communication with many constituents was severed by her loss of reputation illustrates the isolating nature of defamation - how loss of reputation destroys the right to engage in the discussion of public issues.

"..during 1973, ..I talked with thousands of people at their doors. ...There were practically no 'cut-off' responses.

"During 1977, there was a sharp increase in the number of negative responses. Prior to 1977, the little hostility that I encountered was directed almost entirely towards issues, not me personally. The complaints usually started with a terse question like, .'Why don't the schools teach discipline?' This would be followed by a long impassioned statement of position on the issue. The person would be very expressive and would almost always show a desire to have me stay and listen."

"In contrast, during 1977, after the series of defamatory publications began appearing, I experienced an increasing number of complete 'cut-offs'....The reactions were very short with no chance for a response. They were directed towards me personally, with few, if any indications of a vote or particular action of mine that they found objectionable." "It was a completely different experience than I'd had in previous years."(AA--732)

B. The First Amendment right of the public to receive information and ideas may weigh against the defendant and for the plaintiff in a public person defamation suit

This Court has clearly stated that the public does have a First Amendment right to receive information and ideas, and that candidates have an information providing function.

> "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market...It is the right of the public to receive other ideas and experiences which is crucial here."
> "The First Amendment interests of candidates and voters as well as bordcasters are implicated..We have recognized that it is of particular importance that candidates have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates personal qualities and their positions on vital plublic issues before choosing among them on election day. The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for politcal office." (CBS v. Demo Nat'l Com. 412 U.S. 94)

In a libel action with candidate plaintiff and media defendant one cannot automatically assume that the media defendant was serving

the information function and is therefore deserving of special First Amendment protection. It is necessary to review the particular situation more closely. Media influence over channels of communication may be and usually is, used to invigorate the 'marketplace' of ideas. However that power may also be used to eliminate consideration of an idea through defamation of its advocate. Inasmuch as any special First Amendment protection of the press is for the purpose of safeguarding the function of the press, where the media defendant failed to serve that function, the First Amendment interest in an informed public may weigh on the side of the public person plaintiff.

C. The principle established by New York Times vs. Sullivan may favor the plaintiff in a public person defamation suit. The fear of sanctions in the form of libel as well as the fear of sanctions in the form of libel suits warrants First Amendment consideration.

The Times decision and its progeny set forth the general principle that state laws governing civil libel litigation which discourage honest expression about public matters are inconsistent with the First Amendment.

Although the principle has been articulated in cases that illustrate the chilling effect of the fear of libel suits on expression, the same principle reasonably applies where it is the fear of libel which leads to a comparable self-censorship. It is the fear of speaking out that is addressed by the Times principle. Whether that fear is caused by envisioned libel suits or by envisioned libel is of little significance. Participation in the political process is reduced in either case.

The recognition by a state of absolute immunity for a particular form of defamation, opinion or quotation, most certainly would have the same 'chilling effect' on speech addressed in the Times decision. The question should be addressed by this Court.

III. THIS COURT SHOULD REVIEW THE CONSTITUTIONALITY OF CALIFORNIA CIVIL CODE 48A BECAUSE THE LAW IS IN VIOLATION OF APPLICABLE DECISIONS OF THIS COURT.

California Civil Code section 48a is unconstitutional because it violates the Fourteenth Amendment.

A 1950 challenge of Civil Code section 48a, based on the contention that it violated the Due Process and Equal Protection clauses of the Fourteenth Amendment was unsuccessful because the California Supreme Court found that there was a rational relationship between the statute and the legislative purpose for which it was enacted.

As described in a later decision,

> "Plaintiff urged that an unconstitutional classification resulted because those defamed by nespapers-...were unreasonably denied rights accorded to those defamed by others."
> "We said , 'The legislature could reasonably conclude that defamation suits against newspapers...constituted the most conspicuous example of teh danger it sought to preclude' in that they 'because of the business they are engaged in, are the most frequent objects of defamation actions and the danger of excessive damages in actions against them is greatest..'"

> "When the legislative body proposes to address an area of concern in less than comprehensive fashion by 'striking the evil where it is felt most' its decision as to where to 'strike' must have a rational basis in light of the legislative objectives. The same principle was expressed by the U.S. Supreme Court in Rinaldi v. Yeager (384 U.S. 305) when it stated, 'The equal protection clause requires more of a state law than nondiscriminatory application within a class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out.. distinctions that are drawn (must) have some relevance to the purpose for which the classification is made" (Hays v. Wood, 23 Cal 3d 772)

The 1950 ruling was made prior to the establishment of the constitutional requirement that public person plaintiffs in libel actions bear the burden of proving that defendants acted with actual malice. The retraction statute was justified upon reasons that no longer hold.

> "There are at least two bases on which the legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers..., namely,

> the danger of execessive recoveries of general damages in libel actions and the public interest in the free dissemination of news." (Werner v. So. Calif. News., 35 C 2d 1950)

The Court, in its Werner decision, stated that if it were possible to separate the malicious libel from others, as Times now requires, additional review would be required.

> "The rule exists not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely or maliciously; it is not a desire to prevent action from being brought in cases where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly." "If by any process or demonstration..the untruth and malice could be set above and beyond all question of doubt, there might be ground for contednding that the law should give damages to an injured person. But this is not the state of things under which this quesion of law has to be determined." (Werner v. So. Cal. News. 35 C 2d 135, 1950)

Since the constitutionally mandated actual malice requirement now protects the disseminator

of news from excessive damages, there is no longer a need for the retraction statute. The only function that section 48a now serves is to protect the deliberate lie or the statement made with reckless disregard of the truth.

By eliminating the deterring effect of having to answer for libels published with actual malice, 48a increases the likelihood that the public will be denied true reports and persons who take active roles in community affairs will needlessly suffer loss of reputation.

Because, in a public person libel action, Civil Code section 48a serves no positive purpose, and it is deprecative of constitutional rights, this Court should review its constitutionality.

Wherefore, petitioner prays that a Writ of Certiorari be granted.

June 19, 1983

Respectfully submitted,

Julie Fisher

Julie Fisher,
Petitioner

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

138 Cal. App. 3d 627

Work, J. Following an aggressive election campaign, highlighted by intense media coverage, Julie Fisher lost her seat on the San Diego Unified School District Board of Education. Fisher blames her defeat on defamatory statements made by members of her successful challenger's camp, and libels published in local newspapers.

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In this defamation action, Fisher, acting as her own attorney, appeals summary judgments in favor of her successor, Yvonne Larsen, and certain Larsen campaign workers; summary judgments in favor of reporter Michael Scott-Blair and Copley Press Inc. (Copley); and orders sustaining demurrers to certain causes of action. Because there remain triable issues of fact, we reverse one of the summary

judgments for Copley and Scott-Blair, and each summary judgment favoring Yvonne Larsen and her campaign workers (except for designated parties). We affirm the order sustaining demurrers and reject other claims of error cited by Fisher. Finally, we hold the causes for Fisher's failure to prevail in the election are too uncertain to allow her to recover special damages reflecting the lost future and financial benefits of that position in a defamation action.

Factual Background

The contested 1977 election closely followed an illegal, widely-publicized, four-day teachers' strike by the San Diego Teachers' Association (Union) after which Fisher and other school board members granted amnesty to the strikers although the strike activities violated a court injunction. During the primary and general elections campaigns, Fisher and Larsen engaged in a series of bitter claims and counterclaims extensively reported by the two local Copley Press,

Inc. newspapers, (the San Diego Union, and the Tribune) and other local media outlets.

Fisher's suit charges the Larsen campaign defendants, San Diego Union reporter Scott-Blair and Copley with conspiring to defame her during the campaign. She cites various publications: some describing her actions during the teachers' strike in a manner which, in other contexts would have been innocuous but, given her official status and the apparent media and community hostility toward the illegal strike, proved to be politically improvident, and other publications explicitly accusing her of attempting to bribe and blackmail a public official, the superintendent of schools.

The Summary Judgments

When overruling demurrers to causes of action based upon these allegations in Fisher's first amended complaint, the trial court determined the following separate public statements were reasonably subject to a defamatory per se interpretation:

1. Yvonne Larsen's press-conference question: "Do taxpayers like it when Fisher appears at Union rallies and supports their demands?" (susceptible to an interpretation Fisher, an elected school board official, approved and aided an illegal strike by the Teachers' Association)

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2. Contents of a San Diego Union article headlined "Support for Teacher's Union," containing the apparently factual assertion "She openly supported the teachers during their four-day strike in June" (a claim suggesting Fisher was guilty of breaching her official trust).

3. A San Diego Union article flatly stating "Fisher supported and marched with the striking treachers last June." (The inaccuracy of the assertion Fisher marched with the strikers was admitted in a later San Diego Union editorial.)

4. Public charges by Yvonne Larsen accusing Fisher of:

(a) threatening to expose the school board superintendent to false charges of misconduct and illegal acts sufficient to cause him to lose his position unless he officially collaborated with the Teachers' Union, which Larsen characterized as "outright blackmail" and "nothing less than blackmail."

(b) being associated with the illegal teachers' strike "every step of the way;" and

(c) violating her official public trust by disclosing confidential, privileged information to the plaintiffs in a school integration case to which the school board was an adverse party.

5. Press reports of the Larsen "blackmail" charge in news coverage of the meeting during which the accusations were made.

6. Miscellaneous public comments by Yvonne Larsen that Fisher "repeatedly said she would support striking teachers."

7. Yvonne Larsen's charges in a press release accusing Fisher of "(a) violating school district policies and state and federal

laws by infringing upon the students' right to privacy; and (b) violating her oath of office by collaborating in the illegal teachers strike.

8. The San Diego Union's slanted reporting of Larsen's privacy invasion remarks in an article headed "Pupil Privacy Law Broken by Fisher, School Aide Says." (Unobtrusively buried in the article is the aide's acknowledgement both Fisher and the school district had unintentionally violated the privacy laws.)

9. A news article suggesting Fisher had stated she would support illegally striking teachers under similar circumstances in the future.

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Each of these publications are discussed hereafter in the context of the causes of action to which it relates.

Discussion

The holding of New York Times Co. v. Sullivan (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84

S.Ct. 710, 95 A.L.R.2d 1412], bars a public figure, from recovering for defamation unless actual malice is shown by clear and convincing evidence. This requires showing the disseminator of the falsehood either knew it to be untrue or made the publication with reckless disregard for truth.

The summary judgments may be upheld only if the evidence, construed favorably to Fisher, raises no triable issues of fact. It is not sufficient the moving declarations, standing alone, would support a defense judgment. The trial court may not weigh the credibility of declarants nor pass on the merits of the issues presented, and must construe movants' declarations strictly. (Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 851-852 [94 CAl.Rptr. 785, 484 P.2d 953].)

Where allegedly libelous remarks can be understood by an average reader to be either an nonactionable expression of opinion or as a purported truthful statement of fact,

the issue may not be resolved by summary judgment, but is one for the trier of fact. (Slaughter v. Friedman)(1982) 32 Cal. 3d. 149, 154 [185 Cal.Rptr. 244, 649 P.2d 886].) However, where media publications are couched in ambiguous terms, a finding of actual malice may not be found unless the jury is convinced "not only that the words were reasonably understood in their defamatory, factual sense, but also that the denfendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory impact to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact." (Good Government Group of Seal Beach, Ind. v. Superior Court)(1978) 232 Cal.3d.672, 684 [150 Cal.Rptr. 258, 586P.2d 572].) However, whether the publications are forthright or ambiguous, there must be some showing of potential actual malice to avoid summary judgment on that issue.(Id. at

p. 685.)

Fisher, not a lawyer, claims the allegations of actual malice in her unverified complaint satisfies the required showing of actual malice. Fisher misconstrues her burden. While a demurrer tests the sufficiency of the pleadings and, in some instances, material allegations may be pleaded in the form of ultimate facts and in conclusionary language, summary judgment is designed to determine whether triable issues facially raised by the pleading are "real or merely the product of inept pleading." (Coyne v. Krempels (1950) 36 Cal.2d.257,262 [223 P.2d 244].) Code of Civil Procedure section 437c requires a valid com-

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plaint be dismissed "unless the other party, by affidavit or affidavits, shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." (Coyne v. Krempels, supra, at. p. 262.) Allegations of a pleading

may not be considered by a trial court to support or to oppose a summary judgment. (Id., at pp. 262-263) Apparently, because she relied substantially upon conclusionary allegations of actual malice in each cause of action of her unverified complaint, Fisher filed only a short nonfactual declaration attached to her points and authorities and answers she made to Yvonne Larsen's interrogatories. Thus, our review is limited to the numerous depositions provided the trial court, Fisher's answers to interrogatories, and declarations in support of the summary judgment.

"PARTIAL" SUMMARY JUDGMENTS

Special Damages for Losses Flowing From Fisher's Election Defeat

In each cause of action, Fisher's only claim for special damages is based upon the loss of her elective office and its attendant earnings (salary, dental benefits, trips and other benefits). Civil Code section 48a, subdivision 4(b), relating to news

media, defines special damages as those suffered in respect to property, business, trade, profession or occupation and money spent as a result of the alleged libel and allows these to be recovered even where there is no demand for retraction.

The question of whether special damages limited to benefits and salaries, obtainable only by election to public office, are recoverable in a defamation action appears to be one of first impression in this state although it has previously been considered in other jurisdictions.

In (Southwestern Publishing Co. v. Horsey) (9th Cir. 1956) 230 F.2d 319, the court considered whether a defeated judicial officer could recover lost future financial perquisites of office in a defamation action. The court found them too uncertain and speculative because a thousand factors might influence an election,

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including the extent of newspaper coverage,

political leanings of people moving into and out of an area, political party support, group endorsements, volunteer workers' efforts, personal campaigning by the candidates, events in which the candidates participated that might affect their popularity, political trends, and issues debated. The court concluded looking into the causes of election defeats was akin to opening Pandora's box.

A similar holding in Otero v. Ewing (La. 1926) 162 La. 453 [110 So. 648, 650, 56 A>L>R> 249], was delivered with the pithy comment: "It is common knowledge that there are many surprises at the result of elections by the people." (Accord, Fireld v. Colson (1981) 93 Ky. 347 [20 S.W. 264, 265]; Taylor v. Moseley (1916) 170 Ky. 592 [186 S.W. 634, 637]; Lynch v. Republic Pub. Co. (1952) 40 Wn.2d 379 [243 P.2d 636, 640]; Gough v. Tribune-Journal Company (1954) 75 Idano 502 [275 P.2d 663, 668].)

The evidence shows Fisher's reelection was vigorously and publicly opposed by the

ten outspoken former school board presidents, by the current school board president and the publisher and editorial staff of the two newspapers having by far the greatest circulation in the district encompassed by this election. In addition, Fisher's opponent was hand picked by the county central committee of a major political party in an effort to have her defeated. Aside from these factors, even a consideration limited to Fisher's press coverage, preceding and during the campaign, reveals the impossibility of assessing the significance to her defeat of these few beats in the context of the year-long continuous drumroll of mostly negative publicity.

In this modern technological era with increasingly sophisticated polling techniques, we are reluctant to hold, as a matter of law, there may never be a case in which the evidentiary complexities cited in Southwestern may not be overcome. However, the evidence here does not show any possibility

Fisher can establish she would have won reelection except for those statements we deeemed potentially libelous.

Since we find no triable issue of fact in the issue of entitlement to special damages related to loss of salaries and benefits of Fisher's elected office, we affirm partial summary judgments on that issue in each cause of action in favor of all defendants.

Summary Judgment: The Individual Causes of Action

I. Larsen Campaign Defendants

A. The charges of "blackmail" and other criminal conduct and breaches of trust sued on in the sixth cause of action were prepared by Edwin Gray,

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reviewed and adopted by W. Daniel Larsen and delivered by Yvonne Larsen during a public debate late in the campaign. Gray described the speech as an effort to make Larsen's campaign more vigorous, and to this end he included charges of "blackmail"

and innuendos of "bribery." The speech described Fisher's alleged misconduct and criminality in factual terms, although in his deposition Gray admitted previously knowing Fisher had denied the allegations when they were publicized months earlier in the press. He explains he simply chose to disbelieve so much of the news articles as reported Fisher's denials and explanations, and to accept the hearsay statements attributed to Board President Smith who purportedly gave a hearsay version allegedly obtained from the superintendent. Although Gray's declaration in support of his motion for summary judgment is somewhat more self-serving and emphatic, the trial court may not disregard the inference of reckless disregard for truth implicit in Gray's deposition in view of his state motive to present a more vigorous (Dan Larsen said "hard biting") campaign.

These defendants downplay the significance of the blackmail and bribery charges, citing (Greenbelt Pub. Assn. v. Bresler (1910)

398 U.S. 6 [26 L.Ed.2d 6, 90 S.Ct. 1537]. This decision stresses the policy importance of insulating the news media from unwarranted attacks flowing from exercise of legitimate First Amendment rights. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means...is a fundamental principle of our constitutional system." (Stromberg v. California (1931) 283 U.S. 359, 369 [75 L.Ed. 1117, 1123, 51 S.Ct. 532, 73 A.L.R. 1484].)

Greenbelt was charged with including libelous statements of others in its accurate report of a public meeting in which Bresler was accused by several persons of obtaining unfair leverage over the city while negotiating zoning variances permitting him to construct high density housing on land he owned. He was charged with "blackmailing" the city by blocking its efforts to acquire certain other land Bresler owned. The facts reported

did not even hint at illegality. The press article correctly attributed the "blackmail" charge to members of the public at that meeting. The Supreme Court held it was simply impossible to believe a reader of the word "blackmail" in the reports "would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense." (Greenbelt Publishing Association v. Bresler supra, 398 U.S. 6, 14 [26 L.Ed.2d 6, 15].) The court found even the most careless reader would have

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relegated the term "blackmail" to mere rhetorical hyperbole, not an accusation of criminal activity.

However, Greenbelt's facts are far different than Larsen's purported statement of facts

which, if true, describe criminal activities and label them as such. As is pointed out in the concurring opinion of Justice White, The Supreme Court "does not deny that the Constitution would permit recovery for charging the crime of blackmail..."(Id. at pp. 21-22) Public statements purporting to be factual or which may be perceived by a jury to have been presented as factual, rather that opinioin, are actionable if they reasonably can be read in the context of the publication as charging a public official with a crime. (See Good Government Group of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d 672, 683; Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596 [131 Cal.Rptr. 641, 552 P.2d 425].) Larsen's use of the word "blackmail" in the context of the entire statement reasonably may be interpreted as charging a crime. Further, the reporting of these specific charges, although accurate, is subject to an interpretation by the average reader that the Larsens have accused Fisher of

felonious acts.

However, even where the words are reasonably understood in their defamatory factual sense, a defendant is entitled to summary judgment unless the trial court determines there is a sufficient showing of actual malice to warrant submission of that issue to the jury. (Good Government Group of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d at p. 685.)

Here, the question of actual malice turns on whether the Larsens knew the statements were false or made them in reckless disregard of whether they were false. In their defense, the Larsens state the actions which they describe as attempted bribery and blackmail purportedly were made in a face-to face confrontation between Fisher and Superintendent Goodman at a meeting with no one else present. Before making the public statements, the Larsens read two news articles in the San Diego Union, reporting statements made by School Board President Smith in which he

accused Fisher of asking Goodman to support a list of suggestions she presented to him in an effort to avert the then-pending teachers' strike and support a Fisher espoused school desegregation plan. According to Smith, Fisher told Goodman she would call for his resignation if he did not follow her suggestions and, as a result, the teachers went on strike. The Larsens claim they acted reasonably in their belief in the truth of the statements, basing their belief on a chronological history kept by Superintendent Goodman and provided to them before preparing the speech. However,

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the Larsens knew of the past strained relations between Fisher and Goodman (they acknowledge awareness of Fisher's charges made earlier against Goodman which resulted in litigation and law enforcement investigation) and they reviewed the chronology knowing it was prepared by one of only two parties at the meeting in which the bribe was purportedly offered and the blackmail threats allegedly

made.

The Larsens made no effort to check the truthfulness of the chronology as prepared by Superintendent Goodman by contacting either Fisher or Goodman.

Yvonne Larsen, in her declaration in support of summary judgment states: "While declarant is conscious of the bitter attacks upon the school superintendent by [Fisher], declarant had no reason whatsoever to question the veracity or integrituy of the superintendent's report of the meeting with [Fisher], or the reports in the newspapers,...or the statements of the president of the Board of Education in regard to same."

We cannot tell from the court's order of summary judgment whether it believed there was no triable issue of fact in defendants' defense of truth (that the bribery and blackmail were actually attempted) or whether it simply determined there weas no actual malice in the publication. If the former, then the order is erroneous because Fisher's deposition

contains repeated and emphatic denials any such threats or promises were made during her face-to-face confrontation with Goodman.

Nor can the order be upheld on the ground there is no triable issue of fact as to whether the accusations of criminal conduct were made with actual malice. Because a trier of fact could resolve the credibility contest over the dispute as to what actually transpired at the Goodman-Fisher confrontation in Fisher's favor, the question is whether the trier of fact could find Larsens' acceptance of

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Smith's hearsay version without investigation showed a reckless disregard of whether it was false. On this record, we cannot say a jury could not find actual malice. Although well able to do so, the Larsens took no steps to confirm the accuracy of the contents of Goodman's memo by contacting either Fisher or Goodman. And although mere negligence in investigating alone does

not establish actual malice, evidence of the complete lack of investigation to determine the truth of the charges, of the Larsens' motive and intent in making the accusations, and their complete disregard of Fisher's denials may, by accumulation and by appropriate inferences, show recklessness.

"The mere profession of a defendant that he believed in good faith that his statements were true do not automatically entitle him to a verdict in his favor." (Widener v. Pacific Gas & Electric Co. (1977) 75 Cal.App.3d 415, 435 [142 CAl.Rptr. 304], citing St. Amant v. Thompson (1968) 390 U.S. 727, 732-733 [20 L. Ed.2d 262, 267-268, 88 S.Ct. 1323].) The court in Goldwater v. Ginzburg (2d Cir. 1969) 414 F.2d 324, 343, states: "recklessness is, after all, only negligence raised to a higher power." Further "actual malice" may be inferred when the investigation was grossly inadequate under the circumstances. (Vandenburg v. Newsweek, Inc. (5th Cir. 1975) 507 F.2d 1024, 1026.)

There are no First Amendment protections for accusations of criminal conduct or personal dishonesty. (Gregory v. McDonnell Douglas Corp. supra, 17 Cal. 3d 596, 604.) Where the information is from a source known to be hostile to the subject against whom the material is to be used, failure to investigate the truth of allegations solely received from this source may support a finding the publication has been made in wanton and reckless disregard of veracity. (Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 156-157 [18 L.Ed.2d 1094, 1111-1112, 87 S.Ct. 1975].) Where a public official is involved, whether failure to investigate criminal charges documented only by information from a source known to be biased against the person accused are made shows reckless disregard of the truth, is a matter to be decided by the trier of fact. Except as to Harmon, the summary judgment as to the sixth cause of action are reversed.

B. The first and second causes of action

charge Yvonne Larsen, her campaign workers, W. Daniel Larsen (her husband), Joseph Harmon and Edwin Gray with preparing and disseminating oral and written defamation consisting of innuendos falsely accusing Fisher of appearing at Union rallies and supporting Union demands at a time when these remarks were likely to be perceived as charging her with collaborating in an illegal strike designed to unlawfully coerce the Board of Education of which Fisher herself was a member. If proved, this is defamatory per se.

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Fisher's evidence shows she has always publicly stated she opposed all teachers' strikes, including the one in June 1977. Further, Harmon and W. Daniel Larsen each admits he was aware Fisher denied supporting the illegal strike before they prepared and presented the July 27th speech.

Harmon cannot recall upon what he relied in preparing the first press release about the speech. W. Daniel Larsen stated he

held no opinion on whether Fisher favored the strikers going out on strike, only an impression she "was on the teachers' side."

The complete lack of concern for the truthfullness of the innuendos of Fisher's collaboration with the illegal strikers is illustrated by this excerpt from W. Daniel Larsen's deposition:

"Q. Was the truth or falsity of that statement that Mrs. Fisher had supported the teachers going out on strike ever discussed in campaign meetings?"

"A. No, I think it was just an assumed fact that nobody questioned.

"Q. Did you become aware at some point in time that Mrs. Fisher was making statements to the effect that she had strongly opposed the teachers going out on strike?

"A. Yes, but that didn't change our opinion.

"Q. Did the committee do anything to attempt to determine whether or not Mrs. Fisher was, in fact, correct when she said she had opposed the teacher's strike?

"A. No.

"Q. Was there anyone on the committee who was assigned to do research into the truth or falsity of statements that were made in the course of the Larsen campaign?

"A. No, I don't believe so.

".....

"Q. Well, was there ever any member of the committee who said, well, maybe we ought to check it out or talk to someone who was present at that time, or anything of that sort?

"A. Everybody was under the opinion that Mrs. Fisher supported the teachers and the actions that they took, including the strike."

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Here, there are triable issues of fact on the issues of falsity and actual malice. Except as to Edwin Gray, we reverse the summary judgments on these causes of action.

C. The ninth cause of action faults Larsen and her campaign workers for accusing Fisher of (1) violating student privacy laws and

(2) collaborating with (illegally) striking teachers in violation of her oath of office.

That Fisher (as well as the rest of the school administration) violated the privacy laws is undisputed. This statement is not false, and is well within the protected speech of a political campaign.

However, if false, the outright assertion Fisher had collaborated with teachers illegally striking against the board of education of which she was a member is defamatory per se. Although the characterization of her conduct as "unethical and unlawful" is couched in opinion form, the charge of "collaboration" is not. The statement is subject to a reasonable interpretation Fisher actively participated with and assisted the teachers in violating the law.

Although Larsen says she relied on media accounts, including the false report in Scott-Blair's article detailing Fisher's march with the striking teachers (see discussion, post), she ignores Fisher's published, repeated

denials of support for teachers' strikes and the editorial apology for the Scott-Blair misstatements.

Because there is a triable issue of fact as to actual malice, we reverse the summary judgments on the ninth cause of action, except as to Harmon.

II. Copley Press and Scott-Blair

A. The third cause of action accuses Copley Press and Scott-Blair, of defaming Fisher by reporting Yvonne Larsen's press conference, including her question, "Do the taxpayers like it when Julie Fisher appears at Union rallies and supports their demands?" Although the pleadings fault this report as unfair and false, the evidence shows it accurately reports an announcement of candidacy in one of the city's most newsworthuy political races. It is clearly fair and neutral reportage of a news event allowing no inference the press was giving credence to the premise contained in Larsen's isolated question, nor undue emphasis upon that remark in context

of the entire article. Absent an inference of malice, the trial court properly granted summary judgment on this cause of action.

B. The seventh cause of action complains of the news story (commencing on the front page of the San Diego Union's local section and continuing on page 4)

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reporting Larsen's October 24th speech and press release under the heading "School Candidate Larsen Accuses Fisher of Blackmail." Fisher does not claim the article is literally inaccurate. (It merely quotes Larsen's general charges of blackmail and perjury which are the subject of the fifth and sixth causes of action, without embellishment or editorial comment.) However, she faults the press for unfairly distorting its coverage of the event at which the charges were made by displaying her political opponent's unproved charges of criminal conduct in the headlines, featuring the attack in the lead paragraphs and burying Fisher's rebuttal. One who

reads only the headlines and lead paragraph would never know Fisher also appeared and spoke in the same forum. The San Diego Union admits this news coverage was unfair, as was its coverage of other stories highlighting accusations against Fisher, while omitting or minimizing defalcations of others. An editorial mea culpa published after the election describes its coverage of the last week of Fisher's campaign as a "blitz of negative stories," characterized by "bumbling non-actions and non-professional operations."

However, no matter how unfairly the article was presented and how cursorily it is read, it is not false. Even the headlines and lead paragraphs accurately attribute the public accusations to Larsen, a political candidate. Therefore, even though elements of actual malice potentially lurk in this scenario, there is no triable issue on whether the publication is false. Summary judgment was proper.

C. The fourth and fifth causes of action

challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles, she only seeks to recover the "special" damages limited to loss of the future income and benefits of her lost elective office. Since we hold these damages are not recoverable, summary judgments on the fourth and fifth causes of action were proper.

[138 Cal.App.3d 644]

D. In her eighth cause of action, Fisher cites the San Diego Union November 3, 1977, article written by Scott-Blair which bluntly states she had "repeatedly said she would support the striking teachers and vote to grant them amnesty should circumstances similar to the June teaching strike arise again." Although the article emphatically states Fisher made repeated statements to this effect, there is no evidence she did

so.

The press disregarded a formal demand for retraction. Instead of relying on truth as a defense, the press contends the statement, within the scope of the entire article, and in the context of a political campaign, is not defamatory as a matter of law, citing Desert Sun Publishing Co. v. Superior Court, supra, at pages 51 and 53. However, a newspaper article purporting to be accurate, objective reporting or political analysis, stands separately from partisan political publications produced by openly avowed advocates such as those discussed in Desert Sun, supra.

Contrary to these claims, the statement cannot be construed as only a statement of opinion regarding Fisher's future conduct; it purports to be a factual report of Fisher's declared intent to support illegally striking teachers in the future.

Scott-Blair states he was unaware of the falsity of this statement when he prepared the article. However, he continuously followed

Fisher's campaign from before the June 1977 strike, and knew he earlier falsely reported Fisher had actually marched with the teachers during their illegal strike and knew Fisher publicly denied favoring teacher's strikes. (See San Diego Union editorial, 10/17/77, "Uplavici Syndrome Strikes Again...") Because there are triable issues of fact here, we reverse the summary judgment on the eighth cause of action.

E. For the same reasons we uphold the summary judgment on the seventh cause of action, we approve the one awarded to the press on the tenth cause of action stemming from the November 4, 1977, news coverage of a press conference in which Larsen accused Fisher of breaking school privacy laws. The article augmented Larsen's comments with similar accusations from the school board's attorney. Although the unfairness of its mode of presentation was belatedly editorially admitted by the San Diego Union, its contents are factual.

III. All Defendants

F. Fisher raises no triable issue of fact on the question of whether all or any of the defendants conspired to defame her. Summary judgment was proper on the eleventh cause of action.

[138 Cal.App.3d 645]

THE DEMURRERS WERE PROPERLY SUSTAINED

Even though Fisher's notices of appeal do not specify she is appealing the rulings on demurrers, each party has fully briefed the propriety of the trial court's rulings sustaining demurrers to the sixth, ninth, tenth, fifteenth and seventeenth causes of action in the first amended complaint with leave to amend. In response, Fisher filed a second amended complaint in which the causes of action to which demurrers were overuled were restated by eliminating language which the court ordered stricken as surplusage. In spite of the opportunity to amend the sixth, ninth, tenth, fifteenth and seventeenth causes of action, she did

not do so, chosing instead to omit them entirely.

On appeal, an order sustaining a demurrer will be upheld if the complaint or portion of the complaint fails to state a cause of action. (Code Civ. Proc. 430.10, subd.(e).)

The sixth cause of action alleges an article entitled JULIE FISHER CAMPAIGN CLAIMS DENIED BY OTHERS, published in the San Diego Union reasonably can be understood in the context of the article as calling her a liar. However, campaign claims are often vigorously denied. As stated in Scott v. McDonnell Douglas Corp. (1974) 37 CAl.App.3d 277, 291 [112 Cal.Rptr. 609]: "The fact that plaintiff takes umbrage at the tone and level of criticism directed against him is not sufficient to sustain an action for defamation. The statements in the instant controversy should be considered in the light of the usual political hyperbole customarily encountered when political figures clash on controversial public matters."

The article contains no actionable defamation.

The ninth cause of action alleged the Larsen campaign defendants defamed Fisher by criticizing her campaign advertising claim that windowless schools are costing taxpayers $100 million extra.

Viewed against the background of a heated political election, the trial court properly concluded Larsen's comments unambiguously expressed only her opinion and as a matter of law were entitled to First Amendment protection.

In her tenth cause of action Fisher attacks the San Diego Union article entitled BOARD PRESIDENT RAPS FISHER ELECTION PLOY and subheaded "Schools' High

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Cost Disputed." Smith's reputed statements are clearly opinion and the court properly determined they were not actionable. (Okun v. Superior Court (1981) 29 Cal.3d 442 [175 Cal.Rptr. 157, 629 P.2d 1369].)

The Fifteenth cause of action concerned an article published just before election

entitled SCHOOL BOARD EX-PRESIDENTS FAULT FISHER. Fisher admits 10 school board ex-presidents supported her opponent, but claims the story was overplayed. The newspaper, after election, editorially admitted it overemphasized the article and admitted failing to comply with general fair-reporting practices and its own reporting policy by not contacting Fisher for her response before publication. However, the article is factual, newsworthy in the context of the political campaign, and fully protected under the guarantees of the First Amendment. (See Miami Herald Publishing Co. v. Tornillo (1974) 418 U.S. 241, 258 [41 L.Ed.2d 730, 741, 94S.CT. 2831].)

The court also properly sustained the demurrer to Fisher's seventeenth cause of action charging the press defendants with negligent reporting. There is no cause of action for ordinary negligence by a public official against a newspaper. (New York Times Cor. v. Sulluvan, supra, 376 U.S. 254;

Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997].) The official must prove "actual malice" by showing either the statement was made (1) with actual knowledge it was false, or (2) with reckless disregard of whether it was false.

Fisher contends the correct rule is (or should be) that defamation flowing from ordinary negligence alone is actionable. She claims it is only the recovery of monetary damages which the foregoing cases will not allow on a showing of mere negligence. For this proposition, she posits a cause of action allowing a public official to sue for negligent defamation so long as the prayer is limited to a demand for a forced retraction. While there may be statutes authorizing such actions (see conc. opinion, Brennan, J., in Miami Herald Publishing Co. v. Tornillo, supra, 418 U.S. 241, 258 [41 L.Ed.2d 730, 741]), Fisher has not pleaded under one, and she only asks for monetary relief. We are bound by the New York Times

v. Sullivan, supra, standard. (Good Government of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d 672, 680.)

THE TRIAL COURT PROPERLY STRUCK IMMATERIAL ALLEGATIONS FROM THE ORIGINAL COMPLAINT

Fisher claims the trial court improperly struck portions of certain alleged publications from her pleadings. However, two of the cited publications were never included in any causes of action and thus were never stricken, and

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the trial court was within its discretion in deleting non-defamatory statements from others to exclude immaterial evidentiary matters from the complaint.

Fisher relies on dicta from Forsher v. Bugliosi (1980) 26 Cal.3d. 792 [163 Cal.Rptr. 628, 608 P.2d 716], for the premise the determination of whether a publication is defamatory depends on the publication taken as a whole, not extracted statements. We do not quarrel with her proposition, only her suggested

application. Here, the causes of action affected by the motion to strike both withstood demurrer. Fisher was not precluded from pursuing her defamation action based on the total publications. Instead, the summary judgment motion as to these publications proceeded on alternate theories the statements were true or not made with actual malice, not on whether a defamatory meaining was conveyed. Further, Fisher used the entire text of the publications as evidence in opposing the motion for summary judgment.

THE COURT PROPERLY DENIED FISHER's MOTION FOR AN IN CAMERA INSPECTION OF UNPUBLISHED NOTES

Copley Press initially refused a request to produce its employee's (Jacoby) unpublished notes, claiming privilege, but later produced them pursuant to court order.

Six months later Fisher again requested an order compelling production of Jacoby's documents. Copley Press submitted Jacoby's declaration stating: "I have produced all those noted in my possession or under my

control. There are other matters in my notebook which have nothing to do with the Fisher matter and which this Court should not require me to produce." The court denied Fisher's motion and her request for an in camera inspection of Mr. Jacoby's entire notebook.

Code of Civil Procedure section 2034 pertaining to a motion to compel the production of documents leaves the decision to make an in camera inspection of documents to the court's discretion. The record shows no abuse of discretion here. (Dowell v. Superior Court (1956) 47 Cal.2d 483, 486 [304 P. 2d 1009].)

THE COURT DID NOT ERR IN DENYING FISHER'S MOTION TO CONTINUE THE SUMMARY JUDGMENT HEARING

On February 20, 1980, Fisher formally discharged her attorney, substituted herself, and moved for a continuance to obtain new counsel and complete

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discovery. The trial court found the motion

both untimely and without a showing of good cause.

Generally, power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. (Thurmond v. Superior Court (1967) 66 Cal.2d 836, 838-840 [59 Cal.Rptr. 273, 427 P.2d 9851].) However, Code of Civil Procedure section 437c mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify oppostion to the motion. Fisher sought to justify a continuance because she desired additional discovery of the Copley Press personnel and Scott-Blair.

It is not an abuse of discretion to deny a continuance to discover further evidence where the action has been pending a long time and extensive discovery has already been conducted. (Vanderbilt Growth Fund, INc. v. Superior Court (1980) 105 Cal.App.3d

628 [164 Cal.Rptr. 621].) Here, Fisher pursued an ambitius discovery schedule for more than two years, took dozens of depositions and sent out numerous interrogatories. She had already deposed numerous Copley representatives including the publisher, editor, assistant editor, city editor, the reader's representative, the reporter of the subject articles, an employee of Copley International, a reporter for the Tribune and Scott-Blair. Although appearing without counsel, she eloquently, and at length, argued her case. Further, the court received extensive evidence by way of the exhaustive discovery already taken.

While we believe Fisher's request for continuance was not untimely, we find no good cause for the request. Her attorney was discharged because Fisher believed his efforts in pursuing discovery were insufficient. There is no showing he would not have represented her at the hearing except for the discharge. His past performance

reveals he was capable, and had established a good rapport with the trial court. Further, Fisher failed to show she would procure other counsel in the reasonably near future.

The court in a public-figure libel case has the power to control and limit discovery (Herbert v. Lando (1979) 441 U.S. 153, 177 [60 L.Ed.2d 115, 134, 99 S.Ct. 1635].) The trial court properly exercised its sound discretion in deny-

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ing the continuance. Although Fisher had ample opportunity, she does not show how she was prejudiced by the denial of a continuance, either in her points and authorities filed after the hearing on the summary judgment motion, in her declarations in support of her motion for reconsideratin of the summary judgment, or in her appellate presentations.

THE COURT PROPERLY REFUSED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Fisher is not entitled to findings of fact and conclusions of law on the summary judgments.

(Perry v. Farley Bros. Moving & Storage, Inc. (1970 6 Cal.App.3d 884, 889 [86 Cal.Rptr. 397].)

THE MOTION TO AMEND AFTER SUMMARY JUDGMENT WAS PROPERLY DENIED

Fisher knew of the motions for summary judgment as early as January 6, 1981, but took no action to amend for five months. The rights to amend a complaint rest within the sound discretion of the court (Robinson & Wilson, Inc. v. Stone (1973) 35 Cal.App.3d 396, 413 [110 Cal.Rptr. 675]), and may be denied where there has been a long delay in seeking the amendment. (Rainer v. Community Memorial Hosp. (1971) 18 Cal.App.3d 240, 258 [95 CAl.Rptr. 901].) The court was within its discretion in denying the amendment.

DISPOSITION

The orders sustaining demurrers are affirmed.

Summary judgments on the first and second causes of action are affirmed in favor of Edwin Gray, and reversed as to Yvonne Larsen, W. Daniel Larsen and Joseph Harmon.

Summary judgments on the sixth and ninth causes of action are affirmed in favor of Joseph Harmon, and reversed as to Yvonne Larsen, W. Daniel Larsen and Edwin Gray.

Summary judgments on the third, fourth, fifth, seventh, tenth and eleventh causes of action are affirmed.

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Summary judgment on the eighth cause of action is reversed.

On remand the superior court shall strike the prayer for special damages from all remaining causes of action.

Wiener, Acting P.J., and Zumwalt,J. (assigned by the Chairperson of the Judicial Council) concurred.

FOOTNOTES

1. Yvonne Larsen, W. Daniel Larsen, her husband, Joseph Harmon and Edwin Gray.

2. Carlin v. Board of Education, San Diego Superior Court No. 303800.

3. Without relevant opposing declarations, or citations to the material portions of the forty depositions and other documents

subsequently lodged, it is not surprising the trial court failed to locate the relatively few items supporting Fisher's position.

4. Code of Civil Procedure, section 437c reads in part: "If it appears that the proof supports the granting of [a summary judgment] motion as to some but not all the issues involved in the action,...the court shall, by order, specify that such issues are without substantial controversy...and the action shall proceed as to the issues remaining."

5. We do not consider the propriety of seeking such damages as an adjunct to other legal actions, although we are aware they have been disallowed for personal injury (Chrysler Corp. v. Todorovich (Wyo. 1978) 580 P.2d 1123, 1124), and for conspiracy (Ferguson v. Washburn (Tex. 1928) 4 S.W.2d 574, 576).

6. The summary judgments were granted on causes of action pleaded in Fisher's second amended complaint; therefore, different causes of action discussed in various portions of this opinion are identically numbered.

7. Harmon is not shown to be involved in the acts of which Fisher complains in her sixth cause of action.

8. The detailed alleged criminal conduct to support its labeling as "blackmail and bribery" transcends the mere use of such terms as a literary device for ridiculing political conduct. (See Bird, C.J., dis. Good Government Group of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d at p. 689.)

9. Although labeled "blackmail," the language stated only can be reasonably interpreted as an attempt to "obtain..an official act of a public officer, induced by a wrongful use of fear" constituting felony of attempted extortion. (Pen. Code, 518, 524.) (Isaac

v. Superior Court (1978) 79 Cal. App.3d 260 [146 Cal.Rptr. 396].) The language is clearly susceptible to the plain meaning Fisher intended to expose some secret of the superintendent damaging to his reputation, in order to force him to subvert his official position to avoid exposure. (Pen. Code, 519, subd. 4.)

10. The document relied upon by the Larsens entitled "Chronology and Events Leading To and Occurring During June 6-9, 1977 Teachers' Strike Against San Diego City Schools" was apparently prepared by Goodman after the strike had terminated, after the Board of Education had granted blanket amnesty to the strikers and after Fisher made her charges against Goodman in the open board meeting. (It even contains some post-strike editorial comment by Goodman.) The 7-page "chronology" cannot be read as an unbiased report of events insofar as it refers to Fisher's activities. Yet, it is the only document upon which the Larsens claim to have relied.

11. Gray is not shown to have been involved with the incidents described in these two causes of action which occurred approximiately July 27, 1977.

12. On the inside page, the article mentions Fisher had earlier denied the allegations underlying Larsen's charges, when Superintendent Goodman had publicly accused her of threatening to get him if he did not accede to strikers' demands.

13. For a historical overview of even more seamy political aspersions, see Desert Sun Publishing Co. v. Superior Court (1979) 97 Cal. App.3d 49 [158 CAl.Rptr. 519].

14. Civil Code section 48a, subdivision 1 reads: "Special damages; notice and demand for correction. In any action for damages

for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous."

15. The demurrers were sustained to portions of Fisher's first amended complaint.

16. We question whether Fisher's failure to include these specific causes of action in her superseding, second amended complaint precludes her from attacking the orders sustaining demurrers. (See Witczak v. Johnson (1956) 146 Cal.App.2d 599, 601 [303 P. 2d 1091].)
However, the defendants have not argued this point.

17. Two of the publications pertained to the Larsen campaign defendants. Larsen's speech about Fisher's charges against Superintendent Goodman was incorporated in the seventh cause of action of the original and first amended complaints. The trial court struck portions of this speech from the complaint. Larsen's news release about Fisher violating the Pupil Privacy Law was incorporated in the thirteenth cause of action of the first amended complaint. The trial court struck portions of this news release.

18. She also wished to depose two superior court judges and to explore the possibility San Diego Federal Savings and Loan Association

was involved in the "conspiracy" against her. However, she makes no showing this discovery was necessary to oppose the summary judgments.

19. The record reveals the efforts of Fisher's attorney were prodigious.

20 At oral argument, 19 months later, Fisher, who has effectively represented herself on this appeal, was still without counsel.

21. Fisher also purports to appeal from a denial of her motion to reconsider the court's orders denying her continuance of the summary judgment hearings and granting the summary judgments. (Code Civ. Proc., 1008.) However, the court actually granted her request to reconsider, read the supporting documents (which included no new facts) and with exceptional patience and courtesy listened to rambling oral argument. Only then did the court affirm its previous rulings.

WORK, J.

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, Civil No. 24990

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COURT OF APPEAL
MAR 23 1983
KEENAN G. CASADY, Clerk
Deputy

FISHER

v.

LARSEN et al.

SUPREME COURT
FILED
MAR 23 1983
LAURENCE P. GILL, Clerk
Deputy

Petitions for hearing DENIED.

Mosk, J., is of the opinion that the petition should be granted.

BIRD
Chief Justice

APPENDIX 17

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division One

ENTERED

MAR 28 1983

MAR 2 9 1983

1192 772

JULIE FISHER, Appellant

vs.

YVONNE LARSEN, ET AL., Respondents

Judgment Book ___ Pg ___ REMITTITUR

4 CIVIL 24990

San Diego County No. 420137

I, KEENAN G. CASADY, Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on December 24, 1982 and this opinion or decision has now become final.

Appellant to recover costs on appeal.

Witness my hand and seal of the Court this 25th day of March, 1983.

Keenan G. Casady, Clerk

By: Gale Ondler
Gale Ondler, Deputy Clerk

APPENDIX 1B

OPPOSES TEACHER STRIKE

Yvonne Larsen To Seek Fisher Seat On Board

Yvonne W. Larsen, the fifth person to seek the city Board of Education seat for District C, said yesterday that she is opposing incumbent Julie Fisher because Fisher "has seen fit to serve only the interests of the San Diego Teachers Association leaders with total disregard toward the people who elected her."

Larsen, who is a trustee of the California State University and Colleges system, filed her intention to seek election before the deadline last Friday, but did not hold a press conference to formally announce her candidacy until yesterday.

She said she believes San Diegans do not like a member of the Board of Education who encourages teachers to go on strike.

"Do taxpayers like it when Julie Fisher appears at the union rallies and supports their demands?

"And then once the strike is over, giving those striking members total amnesty from their defiance of the court order (to return to work) and their loss on the the job? I am convinced that San Diegans will answer with a loud 'no' to each of these questions," she said.

Larsen made no attempt to hide her disagreement with Fisher's board record.

Would Reverse Vote The board recently voted 3 to 2 to grant the teachers amnesty after the June strike, but Larsen said, "had I been on the board, it would definitely have been a 3 to 2 vote the other way."

She accused Fisher of "irresponsible and disruptive behaviour: at board meetings, and said, "the citizens of District C are not being represented in their best interests."

Larsen said, "The board is far too divided at present to tackle the problems it faces in the next four years. Problems like busing, school financing, and equal and quality education for all.

"These problems can only be resolved by someone with a rational and businesslike approach. Emotional and unreasonable demands will not do." she said.

For Voluntary Desegregation

Larsen said she supports voluntary school desegregation efforts, and believes there is reason to have confidence that they can be made to work.

She said she is not acquainted with or supported by any of the current board members, and does not know any of the other three candidates challenging Fisher.

"I was encouraged to run by people in the District C area (which includes Ocean Beach,

Mission Beach, Pacific Beach, Mission Bay Park, Clairemont, Linda Vista, Old Town, Mission Hills and Hillcrest), she said.

She said it is "sometimes forgotten that 72 per cent of the people in San Diego do not have children in the school system."

Interests Not Represented

Those people are "expected to support the schools, yet nobody ever bothers to represent their interests, she said.

"A member of the Board of Education must walk a fine line between serving their constituents, and the best interests of our school-age children. I will do my best to serve all interests, always mindful of the students' best interests," she said.

Larsen was appointed to the state university Board of Trustees by former Gov. Ronald Reagan to complete an unexpired term in 1974 and 1975. She lost her seat when Gov. Brown was elected. She has lived in San Diego since 1945, and is married to W. Daniel Larsen, president of the San Diego Taxpayers Association.

She serves on the advisory boards of San Diego State University and KPBS Channel 15, and is treasurer of the Armed Services YMCA board of management, and co-chairman of the major mission fund at the Point Loma Community Presbyterian Church.

Larsen is also a past president of the Junior League of San Diego, Inc., a past secretary of the San Diego Symphony Orchestra Association, membership chairman of the Women's Committee for Cerebral Palsy, a former PTA board member of the Loma Portal, Silvergate and Dana schools, and a former trustee of the Children Hospital and Health Center.

CALLED DISRUPTIVE FORCE ON SCHOOL BOARD

District Challengers Agree On One Thing: Fisher Must Go

By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

P-31-77

The three challengers for the District C seat on the City Board of Education do not think much of the incumbent, Julie Fisher, and they do not hesitate to say so. In fact, it is usually one of the first things they say when discussing the election.

"I am appalled and enraged by her behavior on the board," said Yvonne Larsen.

"The incumbent is completely and totally ineffective," said Barbara Brown.

"She has nothing but a disruptive influence on the board which means that little serious discussion can take place," said Jack E. De Barrows.

And Fisher responds, "Obviously they can't attack me on the issues, so they have to resort to attacking me personally."

Deeper Than Tradition

But the challengers insist that their charges go deeper than traditional election campaign tactics and rhetoric.

"The constant bickering and personality clashes among board members is a matter of public concern," said De Barrows, 55, district secretary of the The California-Hawaii-Northern Nevada District of Exchange Clubs.

"In my talks with parents and other taxpayers in this district I have found the major concerns to be taxes, busing and board bickering - that makes it very important," he said.

"I've studied San Diego's education system for the past 15 years and attended board meetings for five years," said Brown, 49, legislative chairwoman of the 9th district PTA.

"Julie Fisher makes good copy, but she does little that really helps the students or the education system.

"Beyond her personal ineffectiveness, she tends to aggravate the other board members to the

point that it reduces their effectiveness. She has got to go," said Brown.

In her four years on the board to date, Julie Fisher, 44, and a math instructor, has been a colorful and often controversial member, openly clashing with fellow members Dorothea Edmiston and the Rev. George Smith, and constantly accusing the district administration of either being misleading or of outright wrongdoing.

On many major issues, the board has consistently filed a 4-1 vote with Fisher objecting, or a 4-0 with Fisher abstaining.

Fisher denies all accusations that this is an attempt to be deliberately obstructive, saying her disagreements with the rest of the board often arise from the fact that she has "done my homework" and the other members have not, and that "my board membership is active rather than passive."

"When we have those 4-1 votes, I am representing the majority of the community," she said.

Asked if that meant the other four members were not representing the community, Fisher said it would be necessary to ask them that question.

Fisher also said that "on those 4-1 votes you will always find that I have done extensive research work, and the other board members have not.

Blanket Indictments Opposed

"There is a national weakness among local boards of education in that they support their administrations," Fisher said.

The challengers oppose Fisher's frequent blanket indictments of the district administration, and especially School Supt. Thomas L. Goodman.

"She has made many accusations against the administration and Goodman which have been proved false," said Larsen, 47, a homemaker and former trustee of California State Universities and Colleges.

"I think we have a well-run district. That is not to say we can't work to improve it, but it is time these criticisms of the district for political reasons were stopped." she said.

De Barrows said, "When you pay a man more than $50,000. a year to do a job, then you work with him until you find that he is violating your policies, and then you fire him. But you don't keep sniping at him - that is a waste of the taxpayers' money.

"Fisher keeps wanting to get rid of Goodman for no particularly good reasons. But there again, she does not seem to be able to work well with anyone except the teachers' union." he said.

Support For Teachers' Union

Fisher's support of the teachers' union is a major point of difference between her and the challengers.

She openly supported the teachers during their four-day strike in June; blames the board's "inflexible attitude on negotiations" for causing the strike, and moved the successful motion that granted full amnesty to all striking teachers after they had ignored three court orders to return to work.

That amnesty vote passed 3 to 2 with John Witt and Phil Halfaker backing Fisher.

But all three challengers for Fisher's seat said, "It would have been 3-2 the other way if I had been on the board."

But Fisher stands firmly behind her decision.

"If I had to go through that again I would repeat my motion granting complete amnesty to the striking teachers - absolutely, yes - if we had not done that, the teachers would still be on strike," she said.

Study Group Planned

Fisher was endorsed by the teachers' union for her first term, and last week, the San Diego Teachers

Association board of directors announced that they have endorsed her again.

"But I believe she will lose the support of many individual teachers and many members of the general public after the way she conducted herself during that strike," said Larsen.

One of Fisher's principal aims for the coming four years is to establish an independent study group that will be able to evaluate all proposals to the board from the administration, before those proposals reach the board.

Fisher said that such a body must be independent of the administration and its members must be able to criticize administration proposals without fear for their jobs.

It is not a new idea. Fisher has proposed it repeatedly to the other board members already, but received absolutely no support.

De Barrows says he disagrees with the proposal.

"Fisher just doesn't trust anyone, and now she wants a staff to check the staff. That's utter nonsense," he said.

Brown also opposes this suggestion, saying, "Fisher is so hung up on the idea of being out to get the administration, that it blinds her to effective action in other areas.

"She believes she is being constantly lied to by the administration and finishes up pushing her personal ideas rather than listening to what other people have to say," Brown said.

On school desegregation, Brown says the district has "dragged its feet a little" over the past 10 to 15 years.

"But there was nothing malicious or premeditated in their actions," she said.

Earlier Problems Forgotten

"Maybe people have forgotten the tremendous problems faced by the district during the recent years of rapid city growth, when parents were clamoring for schools and the district was wrestling with crowded classrooms.

"In the press of those matters, desegregation did not get a very high priority, but now it must be No. 1," she said.

Like the other candidates, Brown expresses strong support for voluntary desegregation.

"The district should have three years to show that voluntary efforts can work, but after that, we must be ready to take another look at those isolated schools and see if the harm of isolation has been reduced and can be eliminated.

"If we conclude that the voluntary effort is not sufficient, then we must be ready to introduce mandatory methods," she said.

Larsen says that increased pressure must be put on other local government agencies to force them to help the school district in its desegregation efforts.

"The district is not getting much help at present. It seems as though they are sitting back, waiting for each other to move," she said.

De Barrows says he is "unalterably opposed to forced busing."

"I see no real limit to how long we should work hard to make voluntary programs work. If I have the chance to vote against forced busing, I will do it to the very last moment. I will support the law if the court makes it an order, but I will oppose it right up to that point," he said.

De Barrows also expresses opposition to teacher strikes, saying, "Though I believe the teachers were pushed into their strike by an insensitive board, I am opposed to the militant nature of the teachers' association."

"Hugh Boyle (president of the

teacher union at the time of the strike) looked as though he should have been talking to people down on the docks or to Teamster union members.

Brown repeated her opposition to strikes.

"It seems that the world of the classroom and the superintendent's office are being constantly separated by issues that have little to do with the teaching of children, and the incumbent seems determined to keep it that way.

"There needs to be some harmony between the teachers and the administration and the board should be playing a role in bringing that about. But the board cannot bring harmony to anyone until there is some harmony in its own ranks," she said.

Current standards of education are a concern of all the candidates, all aggreeing that social promotions through the grades - based on the age of the student rather than ability - are wrong and only injure the students in the end.

"The kids who cannot perform should be held back, and I say that will all possible compassion for the kids involved," said De Barrows.

Fisher says she believes, "There should be some definite standards against which a student can measure academic progress.

Yearly Examinations Urged

"If a student is not up to par at the end of the school year, summer programs should be available to give the student a chance to be ready for the coming year and avoid being held back," she said.

Larsen says she wants to see a final examination at the end of each grade and that should be used to determine promotion to the next grade.

Brown also supports a testing system to determine student promotion, but goes further and says that a quality secondary education should be given greater public status.

"America is still hung up on everyone getting some college education. I agree that everyone should be able to get it if they want it, but I disagree with all the social pressure that says you must have it," she said.

De Barrows says it is time for some strong board leadership that does not "bow to the particular demands of small groups.

"You have got to have board members who have the guts to say 'this is the way it is going to be,' and stick by that, no matter whether it is holding Johnny back or dropping an ineffective program over the objections of some special interest group parents," he said.

De Barrows also says he will press for more discipline in schools.

"I am not really hard nosed, but if a teacher tells a student to sit down, that student should be forced to sit down and the teacher has every right to expect to be backed up in that," he said.

Larsen said she wants a thorough survey of the education programs presently being offered in the city with a view to introducing a little more standardization.

"We have programs going in every direction at the moment and there appears to be too much fragmentation, she said.

Larsen also points to her husband as a source of help to her should she be elected.

W. Daniel Larsen is executive director of the San Diego Taxpayers Association and has been a student of the school district budget for many years.

However, she stresses, "I am running for the board, not my husband, though he is extremely supportive and we are a team effort."

Brown said that after her years of observing the board, she is "ready to run against anyone.

"I feel I really have the best possible knowledge to help me make a contribution to the board and to this community," she said.

District C is a heterogeneous area, Brown says, encompassing Point Loma, but a wide cross section of the city including Ocean Beach, Mission Beach, Pacific Beach, Mission Bay Park, Clairemont, Linda Vista, Old Town, Mission Hills and Hillcrest.

"I believe I can represent them all. I guess the conservatives will go with Larsen and the teachers with Fisher. Here I am, right in the middle of the road, and I believe I am going to win because of that," she said.

Larsen says she can speak not only for the parents, but "for the 72 per cent of the people in this city who don't have children in the city schools.

"But just because they don't have children in the schools now does not mean they are not interested in education - they definitely are, but they are entitled to an assurance that their tax dollars are being spent in the best way possible, and I intend to work for that," she said.

This is a key concern of De Barrows, too.

"A lot of people in this area are retired and on fixed incomes, and they want to be able to feel confident that their tax dollars are well spent.

"I am not going to promise to lower taxes, and anyone who says they will is probably a liar, but I will certainly work to make sure every cent is well spent," he said.

Fisher says she already has made significant contributions to these ends through pushing improved energy policies, a reduction in wasteful truancies, better education programs and her fight to cut the size of the district administration.

IN BOARD RACES

City Teachers Show Political Strength

UNION SEP 21 1977

By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

San Diego teachers once again showed their remarkable political strength in Board of Education elections last night, pitting an unknown newcomer, John S. Adler against incumbent Phil Halfaker, and keeping controversial incumbent Julie Fisher narrowly ahead of a well financed campaign by Yvonne Larsen.

It has set the scene for one of the most important city school Board of Education general elections in decades. That election will be Nov. 8.

There is no doubt that the teachers will be out in force with a good chance of putting two strong teacher advocates on to the five-member board.

Fisher, and Adler - who surprisingly rode right over the better known City Councilman Mac Strobl - are strong supporters of collective bargaining, which is one of the sorest thorns in most board members' sides.

That support brought Fisher and Adler the endorsement of the San Diego Teachers Association, and is certain to ensure that endorsement in November.

In District C, voters will face a distinct choice between Fisher and her challenger, Yvonne Larsen, who as a newcomer ran a strong race against the widely known incumbent.

Not only are the styles of the two women polls apart but their philosophies have virtually nothing in common.

Fisher supported and marched with the striking teachers last June, and fought to get them amnesty after they returned to work.

Larsen is totally opposed to such strikes and would never have granted the amnesty.

Fisher has attacked the school desegregation plan, even supporting some of the city's more extreme groups in an effort to discredit the district administration; Larsen has called for wide-spread support of the plan.

The vote shows that Fisher's support might have been eroded.

TOUGH TO BEAT

There is a saying among even her bitterest opponents that "Julie is darned tough to beat."

Yet a political newcomer was able last night to give a her a strong challenge, and make a clear-cut race of their two philosophies, eclipsing the other two challengers.

Larsen has the strong backing of the more conservative elements of District C, calling for much greater concentration on basic education.

There styles in November will be as different as their positions.

HOW THEY DIFFER

Larsen is polished, sophisticated, conservative in many ways, not too interested in all the experimental educationally innovative of the past decade, but concerned

Scene Set For Important School Board General Vote

UNION SEP 2 1977

with basic education, law and order, employer-employe relative postures and fiscal responsibility.

Usually wearing a light smile, she can become very serous quickly, and there is a touch of steel under the surface.

Fisher fights back from corners. Her deep brown eyes can flash anger in a second, but she can replace that with one of the fastest smiles in town. You can fight with Fisher but she does not bruise easily. She has sat calmly smilingly acknowledging some of the most extensive tonguelashings from board President the Rev. George W. Smith, that have ever been seen on a local city board.

Fisher offers support for many of the things Larsen endorses, but more generally is found to be backing causes rather than substantive issues, and is eager to leap to the assistance of almost every seemingly distressed special interest group, especially if it offers the chance for a pot-shot at the administration.

VICIOUS RACE SEEN

As one observer said last night. "I almost shudder to think about this race in the next two months. It could be vicious."

Halfaker would do well to take a lesson from history as he prepares for the general election.

Four years ago, an unknown called Julie Fisher was backed by the teachers and defeated a well-known incumbent, Louise Dyer, who ran largely on her record believing that should be enough to return her to the board.

This year, an unknown called John S. Adler is backed by the same teacher's organization against a well-known incumbent, Phil Halfaker, who ran a lack-luster primary campaign, depending on his record to get him through.

BIG CAMPAIGN

Last night he admitted that his efforts in the primary would not do for the general election.

"I am saving my campaign for November, that will be the big one," he said.

But Adler now has momentum - a remarkable amount of momentum for someone who faced not only the well-known Halfaker, but an even better-known challenger, Mac Strobl, who is leaving the City Council and was soundly beaten in last night's effort to get on the Board of Education.

Four years ago it was Halfaker who was endorsed by the teachers as he ran a three-was race for a vacant seat.

That year, he had a lot of his campaign work done for him by the teachers association.

ABANDONED

This year, not only has he been abandoned by the teachers, but they are supporting Adler against him. That makes for an uphill fight in developing a campaign with the speed to overtake the young attorney.

For the public the choice will be fairly clear.

If Fisher and Adler win, the teachers' position on the board will be strong, both members supporting collective bargaining, even though Adler opposes strikes.

If Larsen beats Fisher, it will be a vote against her flamboyant style as much as against her philosophies, and a return to the more orderly days of business before the school board.

BLOW TO TEACHERS

It will be a blow to the teachers. There is little doubt that Larsen will support present members Smith and Dorothea Edmiston, and the district administration would be strengthened.

The more conservative hand of Smith, Edmiston and and defeat Adler, because Halfaker has demonstrated in the past that he can be swayed by strong arguments, and that would be a strong trio making the arguments.

Should Adler defeat Halfaker and join Larsen on the board, the weight on the teachers' cause would fall on his shoulders.

Some observers believe that might be to the teachers' advantage.

The Community College Board of Trustees races were predictably lacking in surprises. Lou Ridgeway in District C was the only one of three trustees to face any threat in the primary, with a challenge from two political newcomers.

But an almost complete lack of campaign issues let Ridgeway ride his incumbent's advantage to a clear lead, leaving sociologist and educatior Thomas Gillette and community leader Ardetta Steiner to fight for the right to meet Ridgeway in November.

With little else to separate the two, the voters went for the educator - who also received some endorsements - but the chances of Gillette overhauling Ridgeway in November appear slim at present.

There are still no real issues that appear likely to surface, and Gillette's primary campaign effort gave little indication that he has many significant points to raise in the next two months.

In District A, incumbent Dan Grady stayed ahead of his only challenger, Mary Christian Heising, and they will meet again in November. Charles Reid is unopposed for re-election in District E.

Two re-election campaign claims made by incumbent Board of Education member Julie Fisher were denied yesterday by most of the people involved.

The claims being made by Fisher are that the San Diego school integration plan is a mandatory program, and that three of the four contestants for the two board seats have agreed to limit thier campaign expenses for the November general election.

The campaign expenses have become a major issue between Fisher and her opponent for the District C seat on the board, Yvonne Larsen.

In the primary, Fisher raised $2,387 and spent $1,352 while Larsen raised $15,106 and spent $10,364.

In recent public appearances, Fisher has said that she has an agreement with District B candidates Dr. Phil Halfaker, the incumbernt, and challenger John Adler, to put a limit on their spending for the November general election, but that Larsen will not agree.

Yesterday, Halfaker said, "I have made absolutely no agreements with anybody to put any limits on campaign spending."

Adler said that there had been informal conversations on the subject, and he had said he would agree if all the others did, but he has no formal agreements on campaign limits.

Fisher said that Halfaker is now "reneging" on the agreement which she said occurred at a recent meeting at Standley Junior High School.

At that meeting, Fisher said she proposed a limit of $15,000 (the maximum spent by any board candidate in the most recent elections two years ago) plus an inflation allowance.

She said that as she suggested it, Halfaker was nodding his head and he said, "I have no problem with that. I couldn't raise that kind of money anyway."

Fisher said yesterday that she considered that to be "a formal agreement to a campaign spending limit."

Halfaker said he was not nodding in any form of agreement, he was nodding in acknowledgement of what she was saying. He agreed that he said he could not raise $15,000 plus and therefore any limit would not bother him, but that in no way constituted a formal agreement.

"In fact, if Mrs. Fisher remembers, I jokingly said that if any candidates had any extra money I would be happy to accept it as a contribution to may campaign.

"However, I have made no formal agreements with anyone at all," Halfaker said.

Adler said he remembered all the conversations referred to by Fisher and Halfaker, and that he left with the feeling that the ground had been laid for spending limits if everyone agreed, but no formal agreement was reached.

However, he said that such a limitation would not hurt him either because "There is no way I could raise that kind of money."

Larsen, who appears to be the only candidate able to raise the amount of money being suggested as a limit, said she had not seen any such agreement and will not join one.

"If people want to get rid of Julie Fisher bad enough to contribute money to help me do just that, I am not going to tell them that they cannot contribute," she said.

On the issue of mandatory student movements in the city school desegregation plan, Fisher has said repeatedly that the learning centers proposed for later this year, will involve the forced busing of up to 900 students.

She said that during a recent

Julie Fisher Campaign Claims Denied By Others

Union

OCT 19 197

By MICHAEL SCOTT-BLAIR
Education writer, The San Diego Union

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APPENDIX 29A

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board meeting she asked a school official if the program was mandatory and he answered that it was.

Since then, other board members and school officials have said that the program is mandatory for the district - it was an element of the school integration plan ordered by Superior Court Judge Louis H. Welsh on March 9 - but that student participation at the centers will be voluntary.

At yesterday's board meeting, Fisher sought clarification and was told by Ed Fletcher, assistant supt. for community relations, that student participation will be voluntary but the district must introduce the program because it is a specific part of the court order.

Deputy Supt. Charles Patrick said, "Student participation in the learning centers will be in compliance with the board directive that it be voluntary."

Board President the Rev. George Smith said later that there had been some confusion and misinterpretation of what was meant by the program being mandatory, but he hoped "that it is now clear - the program is mandatory because the judge ordered it, but we will be seeking volunteers to take part in it, just like the magnet schools."

However, Fisher said later, "I know that last July I was told that the program will be mandatory."

School Candidate Larsen Accuses Fisher Of Blackmail

UNION OCT 25 '67

City school board challenger Yvonne Larsen yesterday accused incumbent Julie Fisher of "outright blackmail" against School Supt. Thomas L. Goodman.

She also said Fisher is "glib, combines evasion with sheer demagoguery and is a master of the non-issue and the irrelevant."

Fisher did not answer the accusations, but continued to attack the school district administration and staff as the cause of most educational problems; explained her support last June for striking teachers, and her opposition to the city's school integration plan and windowless schools.

"My opponent is a master of confusing the issue...(one who) has used the Board of Education as her play toy for the past four years," Larsen told members of the Republican Business and Professional Club during a meeting attended by both candidates.

In a prepared speech, Larsen said that both defeated candidates in the September primary - Jack DeBarrows and Barbara Brown - support her against Fisher, saying, "They agree with me that the real issue in this campaign is my opponent."

Both Fisher and Larsen repeated their respective positions for and against the actions surrounding the four-day teacher walkout last June.

Fisher said she is opposed to strikes, but supported the teachers when they went on strike because they had been pushed to the work stoppage by an insensitive school board.

She said she still believes she was right in pressing for and securing amnesty for all the teachers who stayed on strike despite three court orders to return to schools. It was the only way the teachers could be returned to teh schools and some dangerous substitute teachers were finding their way into the classrooms.

Larsen said the strike was illegal and immoral by any standard, "And my opponent was associated with it every step of the way."

OVER STRIKE

It was in connection with the strike that Larsen made her blackmail accusation against Fisher.

Larsen said that during the strike, Fisher "...told the superintendent that if he agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.

"But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation," Larsen said.

(At the time of the strike, Goodman spoke of a conversation similar to this that he said he had with Fisher in his office. Fisher later denied that she had made such threats.)

Larsen yesterday described this as "almost a form of bribery..a shameful action...and outright

Fisher Accused By Larsen Of 'Outright Blackmail'

UNION OCT 25 1977

blackmail."

Fisher did not respond but said "The basic problem in education, here and in the nation, is that it is controlled by unfettered bureaucracies that lead to poor decisions that harm the students and the taxpayers."

SEPARATE STAFF

She said the Board of Education needs a separate staff that can evaluate the proposals and recommendations being made by the district administration.

Fisher said she has repeatedly suggested at board meetings that the district's present testing and evaluation department, which is responsible for assessing the value and effectiveness of new or proposed programs, should be responsible to the board and not the administration.

Fisher has argued that the heads of the evaluation department will not be critical of programs suggested by district officials, because those same officials may have control over the future carreers of their critics.

She said that present board member John Witt supports her idea, and that John S. Adler, who is challenging incumbent Phil Halfaker for the District B seat, also has said he will support her idea.

"Myself, Witt and Adler have agreed to remove that department from under the authority of the superindtendent, so it may happen," she said yesterday.

APPENDIX 32

Schools' High Cost Disputed

By RAY KIPP
Staff Writer, The San Diego Union

Maverick school board member Julie Fisher's claim that windowless schools will cost the district an additional $100 million over the next 25 years drew rebuttals from her fellow board members yesterday.

The Rev. George Smith, board president, and two other board members met reporters to challenge Fisher's figures and political tactics, one week away from her bid for re-election.

"That allegation is absoluitely false," said Smith who has argued the merits of "windowless" school construction with Fisher many times during her four years on the board.

Smith said Fisher's $100 million claim was based on inaccurate figures and was being used as a campaign ploy at the expense of her fellow board members.

He said her television commercials that make the claim $100 million also fail to mention the $100 million figure covers a 25-year period.

However Fisher, who attended the news conference, later defended her contention that the district will lose $100 million because of higher construction costs, larger buildings and higher interest payments over the next 25 years because of the "windowless" design now being used in city schools' construction.

"I can understand them being a little upset by my bringing it up. They made a $100 million goof," she said.

Smith and Dorothea Edmiston, who have had sharp conflicts with Fisher's views on modern school design and other education issues, said later they felt it would be better if Fisher were not re-elected to the board.

Phil Halfaker, who also attended yesterday's press conference, declined to add his views on Fisher's because he also is a candidate for re-election.

However, all three - who cast votes to build "windowless" schools- challenged Fisher's claim of a $100 million loss by not building traditional schools with many windows.

21 SCHOOLS

Smith said the two bond issues which authorized construction of 21 new schools and career centers and a program to bring older schools up to state earthquake safety requirements were approved after considerable study by school officials, teachers, parents, students and volunteers.

He said "windowless" schools - there are windows in these schools but they are small and few in number - are intended to reduce noise, cut vandalism, reduce distractions and provide balanced climatic conditions.

He conceded this type of school construction was more expensive than the traditional school design but said it is nowhere near what Fisher claimed.

COSTS TO DATE

Smith said the construction costs to date for the two bond issues total $105.7 million. (This does not include $11 million for the University City High School or the finished costs for six of the other 20 projects still

San Diego Union

LOCAL NEWS

DIEGO, CALIFORNIA, WEDNESDAY MORNING, NOVEMBER 2, 1977 O PAGE B-1

Board President Raps Fisher Election 'Ploy'

Fisher Criticized For Election Ploy

(Continued from Page B-1)

APPENDIX 33 A

under construction. District officials have estimated that the final figure will be close to $135 million.)

"How then can this add up to $100 million extra?" Smith said yesterday.

Fisher said her figures show the total construction package will end up at $143 million and that the same number of school sites could have been built for $95 million if the traditional school design had been used.

Her $100 million estimate also includes the extra interest payments for the more expensive schools over the 25-year like of the bond issues, the higher cost per square foot and need for larger buildings, Fisher said.

However, Smith and other district officials continue to question Fisher's mathematics.

"I don't care if you put in interest and all the other junk she's talking about, it doesn't add up," Smith said.

APPENDIX 34

FISHER VS. LARSEN

Fierce Clashes Punctuate District C School Campaign

UNION NOV 3 - 1977

BY MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

The race for the District C seat on the city Board of Education has been a fierce personality clash between the two women candidates since the day they filed to run for office.

Throughout the campaign, which ends Tuesday with the general election, the attacks have become more intense and more personal. Indeed, the District C race has resulted in some of the most scathing, personal verbal assaults in any Board of Education race.

"I started out being appalled at Julie Fisher's behavior on the board, but now I know that she is a demagogue and dishonest," said challenger Yvonne Larsen, former trustee of the California State University and Colleges.

Said incumbent Fisher, "After the rush of the campaign, I think that she (Larsen) is going to think about the terrible things she has said about me, and she will not be able to look herself in the mirror."

Not many educational issues have surfaced in the campaign.

Fisher has repeatedly said she would support the striking teachers and vote to grant them amnesty should circumstances similar to the June teacher strike arise again. Larsen said she would never grant amnesty to teachers who ignored court orders to return to work.

Larsen says she would back the school district's integration plan to the hilt; Fisher says she would prefer to replace it with her own plan, and tells parents that the plan now being used will not work.

Both candidates speak of the importance of basic educatin skills, though Larsen accuses Fisher of being more interested in new, "experimental and faddish" programs, Fisher says she is only interested in new ideas that are of educational value.

The real clash has been over the interpretation of how a Board of Education should operate, especially in its relations with the school district administration.

MAJOR MISTAKE

"The board is making a major mistake in trusting the administration," said Fisher.

This has led to her proposal that the district's current testing and evaluation department be taken out from under the control of the top school administration and made responsible directly to the Board of Education.

Fisher says that the board is receiving inaccurate and inadequate information from the administrators, and this is leading to bad board decisions.

No other board members have complained of the information they are receiveing, and, except

FISHER VS. LARSEN

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District C Race Fierce

(Continued from Page B-1)

for John Witt, they have opposed the Fisher suggestion, saying they always have access to the information they want, in the detail they request.

Fisher says that any new administrative ideas are fed through the evaluation department.

JOB CONTROL

Fisher argues that this department will not give an unfavorable evaluation to a proposal that is supported by the top administration because those same top administrators have control over the evaluator's jobs.

Fisher suggests establishing a committee of judges, university heads, and other community leaders, which would select an independent senior staff of the evaluation department, and the evaluations would be made directly to the board.

This has been opposed by Larsen and other board members as being a way of setting up a new bureaucracy, just to serve board members, when no case has been made to discredit the value of the present recommendations from the evaluation department.

Fisher says that the city should never have built any of the new windowless schools, and if the evaluation department had been under separate control, the board would have received information showing that the windowless schools would cost millions of dollars more than traditional schools.

KEY ISSUES

This information was withheld from the board by the top administrators, says Fisher, but other board members and the administrators say her charge is "totally untrue."

Fisher says that if her entire campaign "results in the public being educated on these two issues - the separate evaluation department and the windowless schools - then the campaign will have been successful."

But Larsen says that Fisher's facts and figures are inaccurate, and that she is "only grandstanding and offering the type of empty criticisms that she thinks people like to hear.

"We have not missed a coffee meeting or a discussion with her thoughout this campaign, and I have been appalled to hear Mrs. Fisher change her position to suit the audience," said Larsen.

"I never thought I would use the word demagogue in its real sense with regard to another human being, but that is exactly what she is - a demagogue (a person willing to use false promises, false claims, and use popular prejudices to gain power)" Larsen said.

ETHICS QUESTIONED

"I am running against her because I believe she is totally unfit to hold public office. I resent her lack of ethics, her lack of integrity.

"She has advocated using monies to help minority causes even when she knows it would be illegal to use those monies for that parti-

cular cause. She does it just to make herself look good in front of them when she knows perfectly well that she cannot come through on the promise," said Larsen.

"This attitude and conduct belittles and degrades the voter and the taxpayer - its's disgusting." she said.

Larsen says that if Fisher "does not get her own way, then she will try to make sure nothing anyone else wants will work either. She lacks the sophistication to work on an elected body under a democratic system."

On the district's administration, Larsen said that the board is so divided that is is not able to provide the school administrators with the guidance and leadership they should be receiving.

REAL GUIDANCE

"We are perhaps fortunate to hav a district administration that is able to run as well as it does despite the inability of the board to offer any real guidance" she said.

"The Board of Education members are trying to be a responsible government body in the community and Fisher turns it into her personal circus." said Larsen.

"Many people have a sincere fear that the educational system is failing to provide today's youth with the skills they need to survive and grow in the modern world.

"I share those fears, and I believe the board should be leading the way in building a school system that restores public faith in education. But it can't happen while Mrs. Fisher keeps the board in meaningless turmoil," she said.

RATIONAL DIALOGUE

"I will restore rational dialogue to those board meetings. I have personal standards by which I live, and I will not let myself down nor the voters," Larsen said.

Asked to respond to some of the Larsen statements, Fisher said, "I'm a little taken aback when she reads some of her statements, but I get the feeling that they are not hers.

"I don'tthink she is very knowledgable, and she doesn't seem to be a very fast learner, so far as the educational issues are concerned. She seems to be a very pleasant person, except when she is reading her statements," said Fisher.

"As for calling me a demagogue, you can't really take those things seriously. I have been in politics for many years and I know the pressures for a new person, so I can sympathize with Mrs. Larsen."

FIRST TERM

(This is Fisher's first four-year term on the board and it is her first elected office. However, she said that she gained a lot of experience working for her late father who was in the U.S. Congress from 1956 to 1962.)

Larsen said, "When I got into this campaign, I was not certain of just what I was getting into. But now that I have seen and experienced these last two months, I am more committed than ever to being aggressive right up to the very last moment; of winning this election, and then getting our school board back to the position of public responsibility and respect that it should have.

Class Files Of 81 Bared, States Stern

By
MICHAEL SCOTT-BLAIR

Education Writer, The San Diego Union

Schools attorney Ralph Stern said yesterday that Board of Education member Julie Fisher violated state and federal law by making public the attendance records and grade-point averages of more than 80 Lincoln and San Diego high school students.

However, it appears that the school district also broke the law in the same way in April, 1976, when it published a report on Wright Brothers High School that included the names and grade-point averages of students.

Both acts are violations of the privacy of students, guaranteed under the 1974 Buckley Amendment to federal law, and amendments to the California State Education Code introduced by Senator John Stull, R-Escondido, shortly afterwards, to bring the state in line with federal regulations.

HEATED EXCHANGE

The charges arose yesterday during another heated exchange in the school board election campaign between incumbent Fisher and challenger Yvonne Larsen, who is seeking to unseat Fishr in District C.

For two years Fisher has charged that during the 1973-74 school year, the school district counted 81 students in Lincoln and San Diego high schools as present when they were actually absent most of the day. As a result, she said the district illegally collected federal funds for those students.

UNENTITLED INCOME

District officers say they investigated her accusation within the district and with the County Department of Education, and found that all attendance procedures used at that time conformed with law.

Fisher said she discovered that some city high schools used illegal methods to compute the number of students in attendance during a short period in the 1974-75 school year, and as a result the district collected more income than it was entitled to.

Fisher said that when she discovered the alleged illegalities, she spoke with senior district officers, who thereupon changed the attendance-record procedures at several schools - including Lincoln and San Diego high schools - to make them legal.

Last night Deputy Supt. Ralph Patrick, one of the officers to whom Fisher said she talked, agreed that she had discussed what she called irregularities with him.

COMMON VARIATIONS

Patrick said that a check was made and differences in procedure were found, but such differences are common in the district, depending on whether a school is using a computer for attendance or for other reasons.

He said that a check was made of all the systems being used in the schools mentioned by Fisher, and all were found to be in full compliance with the law.

"This district collected no government funds illegally," Patrick said.

Patrick and Goodman ordered a check of the charges. Yesterday Stern said he also ordered a separate check, and both found the district procedures to be legal.

PRAISE FROM DIXON

The county was asked to do a similar check, and recently County

San Diego Union

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AN DIEGO, CALIFORNIA, SATURDAY MORNING, NOVEMBER 5, 1977 O O PAGE B-1

APPENDIX 38A

Pupil Privacy Law Broken By Fisher, School Aide Says

Fisher Broke Privacy Law, Aide Says

Supt. E. Ted Dixon said that his office had found no irregularities - in fact, he said, the city school district kept one of the best attendance records in the county.

Fisher said that "Dixon changed what he was saying after he talked with city school officials."

Fisher researched the records of Lincoln and San Diego high schools and produced a list of 81 students with their attendance records and grade-point averages, all of them extremely low.

DEBATE MATERIAL

On Oct. 25, candidates for the board held a debate before members of the city school administrators' association. At that meeting, Fisher left approximately 100 packets of campaign literature on a table, along with copies of the 81 students' names, attendance records and grade-point averages.

During the meeting, she invited those attending the debate to take a copy of the material, Larsen said in a news conference.

Larsen accused Fisher of "violating state and federal law...contravening strict district policy...and jeopardizing tens of millions of dollars in fereral funds" by making the names and other details available to the administrators and public.

Fisher denied any violation of the law, but agreed that she had not read the district policy recently.

'IN ANY CASE...'

"In any case, those school principals and administrators have access to all that information whenever they want it," Fisher said.

Stern and School Supt. Thomas L. Goodman said that is not true.

Under the district policy, which Stern said follows the state and federal law, a student's records are only available to the student, his or her parents, teacher, principal of the school involved, and to administrators who have business with that school.

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As an example, Stern said that if Goodman was investigating the possibility of expelling a student, he could check the student's records.

NO IDLE CURIOSITY

"But if Goodman wanted to just check out how well his next-door neighbor's kid was doing, the records would be closed to him by law," Stern said.

He said that the law closes all student records except for specific reasons and under defined circumstances.

"Mrs. Fisher's action is not covered by any of those exceptions," he said.

Asked which would be the more serious violation, release of the grade-point averages or the attendance records, Stern said: "I believe (the release of) both is an invasion of privacy under the law."

NO ACTION SEEN

Stern said the district will take no action in the matter unless a parent of one of the 81 students or a federal agency files a complaint.

He said state law does not provide for any punishment for a district or district officer who violates the law, but the federal law says if ther are "flagrant violations" then all of a district's federal financial aid can be withdrawn.

The district currently receives about $23 million a year in federal aid.

However, Stern said that he did not believe there is any chance of the federal government seeing Fisher's action as constituting a flagrant violation, and he does not believe the district's federal funds are threatened.

CONCEDES COMPLIANCE

Fisher agreed yesterday that the district's attendance procedures are in compliance with the law, and have been in compliance since the alleged inaccuracies were cited by her two years ago.

Asked why she has continued over the two-year period to bring the matter before the board, she said that she believes a full investigation should be conducted and any unentitled funds received by the city should be returned to the government.

In recent board confrontations, Fisher has said that Goodman should be fired because he has failed to carry out this investigation, but she said last night that she no longer believes this is necessary.

"I just believe the money should be returned," Fisher said.

DISTRICT'S FACE RED

On the question of the school district making similar violations of student privacy rights in 1976, district officials - who were made aware of the apparent infraction last evening - admitted that it appears they did violate student rights, and said they are embarrassed about it.

In April, 1976, the school district made public a progress report on Wright Brothers High School.

In that report, in order to show how successful the program was, the names of students were listed, with their grade-point averages for June, 1974, and February, 1976. The figures showed that the students had improved, but Stern agreed last night that the inclusion of those figures violated the state and federal law and the district's policy.

He said he had spoken to officials responsible for the report and they agreed that the student names and grade information should have been excluded.

"They were shocked to look back at that report and see the figures. It was definitely an unfortunate oversight," Stern said.

Union

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School Board Ex-Presidents Fault Fisher

10 Issue Joint Statement Calling For Ouster Of Incumbent Trustee

By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

The 10 living former presidents of the city Board of Education have issued a joint statement calling for the removal of incumbent Julie Fisher from the city school board in Tuesday's elections.

Richard F. Kreile, who served on the board from 1971-75 and served as spokesman for the former presidents, said it was an "unprecedented action " in school board history, and though the 10 former presidents had "divergent political, philosophical and educational views, we are agreed that Mrs. Fisher should be removed from the board because of her disruptive and counterproductive influence on the city's education system at a time when there is a need to improve local educatin and the public's confidence in it."

Kenneth Rearwin (1951-57) said the former presidents had watched Fisher's board performance with mounting concern and in June, seven of them mpt to consider initiating a recall election of Fisher. They decided instead to oppose her reelection, and yesterday all 10 strongly endorsed the challenger, Yvonne Larsen.

Gene French (1963-73) said that Fisher's practice of "generating explosive issues and then throwing them before the public is dangerous in a large urban school district where the very size of the district generates difficult problems for which there are no easy solutions."

Arnold O. Steele (1963-71) said that Fisher's "continued attempts to build her personal image by trying to undrmine other board members and the school administration exemplify a wrong attitude and commitment to public life."

The other former presidents

who signed the statement but were not present at yesterday's news conference were: Mildred L. Hale (who served on the board from 1929-33 and 1937-58), William P. Elser (1956-63), Dick Grihalva (1956-63), Marion F. Jessop (1958-65), R>L> "Dick" Johnston (1967-73), and Louise Dyer (1965-73). Dyer was defeated by Fisher in the 1973 election.

Kreile said yesterday, "I had the misfortune to serve on the school board with Mrs. Fisher for two years.

"I found her to be a person who first makes up her mind on an issue and then goes out to seek information in support of her position. She will listen to nothing else," he said.

He said that as a result of Fisher's conduct, "the board is an embarrassment to the public. Her by-words are conflict and chaos, and those of us who have given many years of dedicated work to the city schools are torn to see this happen."

Rearwin said, "Her self-serving tactics of reducing everything to a public knock-down, drag-pout spectacle reduce the board to a laughing stock in the community, and that is a great disservice to the city and the schools."

French said Fisher has been "A negative influence on education in this city."

Kreile, who has served on the Democratic Central Committee and the State Water Quality Commission, added, "Mrs. Fisher is the most irresponsible public official I have ever had contact with."

He said that while he was board president, Fisher was on the board and was constantly trying to get board members to vote for her ideas in return for her vote in favor of their ideas, in what Kreile described as an effort to trade votes with other members.

Ex-Board Leaders Fault Fisher

(Continued from Page B-1)

DOUBT SUPPORT

French said that though the teacher union leaders support Fisher he does not believe that she has support among the 5,000 teachers.

"I talk to many teachers," said French, who is now on the Board of Trustees of the San Diego Community College District "and I find that many times Mrs. Fisher has been an embarrassment to them."

In supporting Larsen, Steele said she would be a "calming influence on the board at a time when the lack of public confidence in education has reached the crisis level.

"Mrs. Fisher behaves like a firebrand in a dry and tinder-laden situation," Steele said.

Rearwin said he believed Larsen could help the board and teachers work to correct some of the city's educational problems, while Kreile and French endorsed his view.

Kreile said that the carefully-worded endorsement of Larsen was checked over by all the presidents who signed and had the full approval of them all.

UNITY NOTED

The endorsement said that the signers were "taking the unprecedented action in view of our united concern over the future of public education in our community.

"We are urging all qualified voters to vote for Mrs. Yvonne Larsen for Board of Education, and unseat the incumbent, Mrs. Fisher," the statement said.

Larsen said she knew nothing of the action by the former presidents until they came to her with the endorsement.

She said, "It makes me even more challenged and committed to make a clear statement to San Diego that I will work to make quality education available to all students."

Uplavici Syndrome Strikes Again . . .

ALFRED JaCOBY

The word game is a fascinating business. Words constantly take on new meanings. Misused words become common terms. The dictionary is no longer supreme in this world.

The other day, I found a wonderful phrase that fits the situation: the Uplavici Syndrome.

About 90 years ago, according to a recent bulletin of the American College of Surgeons, a research paper titled "on Dysentery" was published by Dr. Jaroslav Hlava in Prague in the Czech language. Dr. Hlava's work was soon abstracted in a German bibliography. In the translating process, however, the byline was dropped and the research paper's title substituted for the author's name.

Thus: "O. Uplavici" ("On Dysentery," in Czech) became the author of what was to be an oft-quoted work on dysentery.

Thus: The Uplavici Syndrome...an inadvertent error which is repeated and repeated until becomes fact.

It's the power of the written word. If someone tells you something - its a rumor. If that rumor gets printed in a newspaper or magazine - it becomes fact.

The paragraph above, for example, may prove my point. If I told you about Uplavici's Syndrome, would you believe the story? Now that you've read about it, don't you? (I certainly believed it - when I read about it.)

Newspapers suffer from Uplavici Syndrome from time to time. A "fact" is reported incorrectly in a news story. Then it's filed as a "fact" in our Library. That same "fact" becomes a Fact five years later when another reporter uses the original story as a reference.

"Never trust the clips," a good reporter soon learns. "Always check the facts, regardless of their origin."

Uplavici's Syndrome was called

to my attention by Dr. Richard D. Perlman, who referred, in turn, to wide-spread editorial comment which repeats the oft-heard statement that General Motors spends more for health insurance than for steel.

The truth is, a spokesman for General Motors contends, there are thousands of steel suppliers, none of which receives as much from GM as GM spends for health insurance.

All together, however, GM is quoted as saying, it spends far more for steel than for health insurance.

My favorite example of a local Uplavici Syndrome would be the legend of the Duke and Duchess of Windsor and Hotel del Coronado. If one is willing to believe a long-lived story, the duchess (then a Navy-wife living here) met the duke in 1933, when he visited Coronado.

In fact, some firmly believe, they met at a banquet at the Hotel del Coronado.

It's a wonderful story. It's also false, an Uplavici - as attested by the memoirs of both the duke and duchess.

Another example of Uplavici's Syndrome was printed recently in The San Diego Union in a post-primary analysis story of the voting in the school board election. The story, written by one of The Union's most-accurate reporters, said that Incumbent Julie Fisher had marched with the school teachers in their recent strike. Through an error in the page-layout process, the fact that the story was an analysis was dropped from the story's headline.

The allegation of the marching with the teachers has been challenged by at least one reader. Fisher herself denies it.

The reporter says the incident occurred on the day the strike ended, a Thursday, when an estimated 1,500 to 2,000 teachers picketed the Education Center. The reporter recalls walking out of the building and seeing Fisher in the throng of teachers.

According to Fisher, "I walked from my parking place, where all the trustees park, to the Ed Center door. There were lots of pickets in the area and I spoke to some of them. I was stopped once because of the TV cameras and the reporters. But I wasn't marching with the teachers. I walked the same distance that all the trustees did to get to the door.

Two other reproters on the scene, looking back through the haze of three and a half months, confirm Fisher's story - that she was walking from her car to a meeting and not marching with pickets.

The Union's news stories on that day's events show no indication that Fisher was walking with the strikers, either. That she was supported by the strikers and that she generally has indicated sympathy with their cause isn't in dispute.

What is disputed is one sentence in one story.

The only conclusion that can be drawn by the Reader's Representative is that The Union was inaccurate in saying that Fisher marched with the teachers in the strike. Another conclusion is that The Union was sloppy in presenting an analysis story without identification so that is appeared to be a news story.

Why correct it now, three and a half months after the strike and nearly a month after the story ran?

Because we believe it's better to set the record straight now - with a school board race in progress - rather than add another example to the saga of Uplavici's Syndrome.

School Vote Coverage — Careless

ALFRED JaCOBY

Is it possible for a newspaper to be committed to fair and unbiased reporting and yet appear for a full week as though it were devoted to the defeat of a particular candidate?

Cannot carelessness in the coverage and display of news be truly as bad as news deliberately slanted?

The answer to both questions is "yes," and the performance of The San Diego Union during the week preceding last Tuesday's school board election is proof of the case.

Specifically, in the Julie Fisher-Yvonne Larsen school board contest, The Union's stories were, at times, unfairly reported; The Union's headlines were often unfairly damning toward Fisher; and The Union's placement of stories seemed designed to create an anti-Fisher mood which may or may not have existed.

Despite all this, it's the opinion of this reader - after considerable checking with the writers and editors responsible - that all the above was not the result of a direct conspiracy or design. Rather, I'm convinced that something far worse must take the blame; Carelessness.

Cynics in the news business say they prefer deliberate slant to carelessnes. After all, the reasoning goes, there is a certain professionalism in doing a job well, regardless of the job.

Perhaps so. I would like to think that The Union has progressed to the poiint where we may be careless - but at least we aren't deliberate in being unfair.

And I would also like to think that the next step would be to eliminate the carelessness...a step I am convinced is both needed and desired.

But as far as the school board coverage is concerned, it WAS a sloppy, careless job and needs

a public review. So let's go back to the week before the city and school board election.

The only real conflict seemed to be in the School District C, where Julie Fisher, the incumbent, was matched against Yvonne Larsen. It would not be unfair to say that Fisher represented and anti-Establishment, anti-Administration point of view and that Larsen was both pro-Establishment and pro-Administration.

With this setting, The Union's obligation was especially significant - to report and present an unbiased view of the last-minute campaign.

Here's how we did, in the view of this observer, who, out of town during the week, saw the papers only afterward with no in-house or outside preconceptions.

Both Tuesday and Wednesday morning's papers featured front page stories on the local news section page that typified a reporting technique long considered unfair: If an opponent makes an accusation, feature the attack in the lead and headline of the story while putting the rebuttal well down in the same story.

I'm not saying this was a deliberate action in this case. News stories need to be interesteing: attacks and conflict are, per se, interesting - so it's always easier to lead with the attack.

But that technique doesn't make for balance, something greatly desired in political stories. The easiest way to measure the effect of the story is to see what the copyreader produces as a headline.

On Tuesday morning, the headline was "School Candidate Larsen Accuses Fisher Of Blackmail." The story was about a meeting at which BOTH candidates spoke.

On Wednesday morning, the headline was "Board President Raps Fisher Election 'Ploy'." Again, Fisher attended the news conference at which the charges were made. Again, the headline reported the attack on Fisher. (The quotation marks around 'ploy' were meant to imply the word was not ours, but, rather those of the person being quoted. Unfortunately, the quotation marks were left off on the headline for the continuation of the story, on an inside page, thus adding to the implication The Union was injecting editorial opinion to the news.

Saturday morning's story had to do with a dispute over disclosure of students' personal records. In essence, the story said that both Fisher and the school district apparently had broken the law regarding privacy of school records.

But the story itself was written with the lead - the first paragrph that is supposed to summarize its contents - aimed at Fisher's apparent violations. The second paragraph was devoted to the school district's apparent violations.

Further, the story was structured so that the third through 35th paragraphs were devoted to the background of Fisher's part in the story. Only in the 36th paragraph does the story return to the school district.

There are lots of ways to write every story, as every reporter and editor knows. The important thing is that the story present information in an even-handed way. The idea is that the reader comprehend the facts in the same manner as the writer and editors.

In this case, even the headline writer was confused. The headlines read: "Pupil Privacy Law Broken By Fisher, School Aide Says."

As a number of readers have pointed out, both Fisher AND the district were implicated and both should have been mentioned in the headline.

On the Sunday morning before the election, the front page of

Best Copy Available

the Local News section featured a report that the 10 living former presidents of the San Diego school board were opposing Fisher: The story came out of a Saturday press conference - but was based on a statement issued three days before, on Wednesday. There was no comment nor answer from Fisher.

And, as a matter of fact, the statement was carried in a political advertisement in the Evening Tribune Saturday morning before the press conference (and was scheduled and carried as an ad in Sunday morning's Union).

The editors and reporters involved knew of the pending story on Friday but chose to hold it until the Sunday paper on the promise it would be an exclusive. Yet, on Wednesday, the political ad had been submitted for use in Saturday's Tribune and Sunday's Union.

Clearly, the Union's editors were had - by a political campaign ploy.

The Union's rule for political stories - and especially last-minute attacks - is that the other side must be given a chance to answer.

Why wasn't Fisher contacted?

Again, the answer seems to be a combination of slip-shod execution by reporters and careless direction by editors.

The story itself wasn't really worth the heavy display it received, in my opinion. The editors in charge felt differently and chose the Fisher story to lead the page. Their supervisors, who should have known better, busy with weekend activities, didn't object, although the question of giving Fisher a chance to comment, was raised.

The answer was that Fisher was to be contacted after 6 p.m. so that what was considered to be an exclusive story would not be lost. But that "exclusive" had already been lost by publication of the ad that day.

Was Fisher called? She says she was at home all evening and heard from no one. Members of the night side staff at The Union say they didn't know they were supposed to call her. Day side staffers aren't sure the word was passed to make the call.

No one, meanwhile, on the other desks which have the responsibility for carrying out the general rules for fairness challenged the story as it stood.

And no one, on Sunday, followed through in a belated attempt to contact Fisher to get, at least, a comment.

Ironically, a story on Page 1 of the same Sunday morning paper reported that The San Diego Union Poll showed Fisher with a substantial lead.

The statistics for that Poll had been gathered the previous weekend - before the blitz of negative stories during the campaign's final week. That the stories had an effect is certain: Fisher, shown leading in The Union Poll a week before the election, was defeated decisively last Tuesday.

Again, could all these bumbling non-actions and nonprofessional operations truly be just as I've concluded: Carelessness? Was there truly no concentrated campaign against Fisher, a candidate against whom The Union had editorialized?

My answer is still - "yes."

Why? Pure instinct, for one. The reporters and editors involved in all this, shown the overall picture, generally acknowledge they should have been aware at the time of the culminative effect built up over the week.

And, finally, there is a general feeling among staff members and editors that not only was The Union's performance shabby - but that it must improve to avoid a repeat in the future.

Permit me, please, a bit of philosophy: a newspaper is a lot

Best Copy Available

like life itself: You go forward three giant steps and hope to slide back only two. The Union has gone forward a lot in recent years.

The Reader's Representative must be both a pessimist and an optimist. He reflects, I hope, the readers of this newspaper.

APPENDIX 48

Best Copy Available

Office Supreme Court, U.S.
FILED
JUL 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2130

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JULIE FISHER,

Petitioner,

vs.

YVONNE LARSEN, W. DANIEL LARSEN, JOSEPH K. HARMON, EDWIN J. GRAY, THE COPLEY PRESS, INC., and MICHAEL SCOTT-BLAIR

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Respondents, The COPLEY PRESS, INC. and MICHAEL SCOTT-BLAIR respectfully request that this Court deny the petitions for writ of certiorari, seeking review of the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, reported at 138 Cal.App.3d 627, 188 Cal.Rptr. 216 (1982).

REASONS WHY THE WRIT SHOULD BE DENIED

I

NEITHER THE DECISION BELOW NOR THE RECORD RAISES A CONFLICT WITH STATE OR FEDERAL CASES WARRANTING REVIEW BY THIS COURT.

A review by this Court on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons for granting the writ.

None are present in this case, which is only at the pretrial stage.

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, Fisher v. Larsen, 138 Cal.App.3d 627, 188 Cal.Rptr. 216 (1982) is not in conflict with a decision of another state court of last resort or of a federal court of appeals or with any decision of this Court. Rather, the decision and the record reflect that the appellate court properly applied this Court's holdings in New York Times v. Sullivan, 376 U.S. 254, 11 L.Ed. 686, 84 S.Ct. 710 (1964), Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L.Ed. 2d 1094, 87 S.Ct. 1975 (1967), St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed. 2d 262, 88 S.Ct. 1323 (1968), and Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d 789, 94 S.Ct. 2997 (1974) that a public official in a defamation action must

prove actual malice by showing that the statement was made with actual knowledge that it was false or with reckless disregard of whether it was false and that FISHER failed to do so.

Additionally, the opinion below is consistent with settled case law in California and other state courts of last resort. Good Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal.3d 672, 150 Cal.Rptr. 258 (1978); Desert Sun Publishing Co. v. Superior Court, 97 Cal.App.3d 49, 158 Cal.Rptr. 519 (1979); Scott v. McDonnell Douglas Corp., 37 Cal.App.3d 277, 112 Cal.Rptr. 609 (1974); Otero v. Ewing, 162 La. 453, 110 So. 648 (1926).

This case is consistent with numerous recent federal and state cases where summary judgments in public figure defamation cases have either been upheld on appeal or reversed for failure to

grant summary judgment. Medico v. Time, Inc., 643 F.2d 134 (3rd Cir. 1981), cert. denied 102 S.Ct. 139 (1981) [court affirmed summary judgment in favor of defendant news magazine which had published a summary of an FBI report identifying the plaintiff as a member of an organized crime family; court held that the plaintiff had failed to establish a genuine issue of fact concerning a possible abuse of the fair report privilege]; Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980) [court affirmed summary judgment in favor of defendant publisher whose article claimed that cooperative headed up by a public figure plaintiff had been losing money over the last year]; Porter v. Guam Publications, Inc., 643 F.2d 615 (9th Cir. 1981), cert. denied 102 S.Ct. 475 (1981) [court reversed a verdict in

favor of the plaintiff holding that summary judgment should have been granted for the defendant newspaper which had reported the contents of a daily police bulletin because the plaintiff had failed to present any real triable issue of fact]; Warren v. Herndon, 115 Cal.App.3d 141, 171 Cal.Rptr. 220 (1981) [court affirmed summary judgment for defendants].

Here, the petitions for certiorari fail to raise significant issues demonstrating an actual conflict in the federal courts of appeal or state courts of last resort requiring pretrial review by this Court of the case.[1]

---

[1] If the Court grants review of the case, Respondents, THE COPLEY PRESS and MICHAEL SCOTT-BLAIR request that this Court reinstate the trial court order granting summary judgment to all defendants on the ground that FISHER failed to show a genuine issue of material fact that the defendants knew of the falsity of the material or acted with reckless disregard of the truth.

II

THIS CASE DOES NOT PRESENT ISSUES WHICH MUST BE SETTLED BY THIS COURT AT THIS TIME.

Petitioner JULIE FISHER, in pro per, is in essence urging this Court in the first Question Presented to abandon the New York Times v. Sullivan and Gertz rules long established by this Court and apply a negligence standard to reporting of political debate. Such a result is contrary to the First and Fourteenth Amendments to the United States Constitution which embody a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" expressed by this Court in New York Times v. Sullivan, 376 U.S. 254, 11 L.Ed. 686, 84 S.Ct. 710 (1964).

Petitioner FISHER's position that opinions are actionable is without merit

and does not justify review by this Court. Gertz v. Robert Welch, Inc., 418 U.S. 323 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 131 Cal.Rptr. 641 (1976).

Petitioner FISHER's second Question Presented is not supported by the record or the decision below. FISHER failed to state triable issues of material fact meeting the standard required for a public official in a defamation action. Accordingly, summary judgment was granted and demurrers to other causes of action were sustained by the court.

Petitioner FISHER's third Question Presented requests this Court to invalidate a State statute, California Civil Code § 48a, without any support in the record for such drastic action by this Court or reasoned basis requiring Supreme Court review. It is well-settled

that this Court will not pass on the constitutionality of an act of the State legislature where other grounds are available and disposition of the issues of the case. FISHER admits that the New York Times v. Sullivan rule requires her to show actual malice. Thus, it is unnecessary for this Court to even address the constitutionality of California Civil Code § 48a. NAACP v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78

S.Ct. 1163 (1958). Therefore, FISHER's petition must be denied.[2]

---

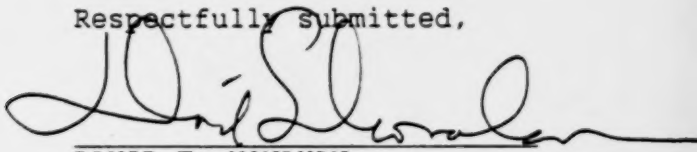
[2] A second petition has been brought by the Larsen defendants. Although Respondents sympathize with the Larsen defendants' position, Respondents do not agree that the writ should be granted as the petition fails to raise significant recurring constitutional issues requiring pretrial review by this Court. For example, the courts below applied the New York Times rule to the advantage of the nonmedia defendants. Thus, there is no need for this Court to decide the issue at this time when the Larsen defendants have not been adversely affected by the lower court ruling on this issue. However, if the Court grants review of the case, it should consider whether the order granting summary judgment to all defendants should be reinstated on the ground that FISHER failed to show a triable issue of material fact that defendants knew of falsity of statements or acted in reckless disregard of the truth. Respondents submit that they are entitled to summary judgment in their favor on all issues.

CONCLUSION

For these reasons, Respondents respectfully request the Court to deny the petitions.

DATED: July 22, 1983.

Respectfully submitted,



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NO. 82-2130

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JULIE FISHER

Petitioner,

vs.

YVONNE LARSEN, W. DANIEL LARSEN, JOSEPH HARMON, EDWIN GRAY, MICHAEL SCOTT-BLAIR, and THE COPLEY PRESS INC.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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Petitioner

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FIRST QUESTION PRESENTED FOR REVIEW

The first question presented for review is whether the First and Fourteenth Amendments require that states abandon their common law to extend greater protection to media defendants than that guaranteed by the actual malice rule; specifically, whether media defendants in public person defamation actions must be given absolute immunity for defamatory statements of opinion or for republished, newsworthy, libelous statements published with actual malice.

This question is closely akin to that considered by this Court in Herbert v. Lando.

> "The question here is whether those amendments should be construed to provide further protection for the press when sued for defamation than has hitherto been recognized."
>
> "It is...urged by respondents that the balance struck in New York Times should now be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation." (Herbert

v. Lando, 441 U.S. 169, 155)

The gist of respondents' argument is that this Court need not consider this question because the disputed privileges were firmly established by the New York Times decision and its progeny. They argue that it is petitioner who seeks to have this Court change its interpretation on the opinion and republication issues.

> "Petitioner...is in essence urging this Court in the first Question Presented to abandon the New York Times v. Sullivan and Gertz rules long established by this Court and apply a negligence standard to reporting of political debate."
>
> "Petitioner FISHER's position that opinions are actionable is without merit and does not justify review by this court." (Respondent's Brief in Opposition, pages 6,7)

As was the case in Lando, it is respondents who are advocating modification of the balance struck by New York Times. They have considerable support. Courts in many jurisdictions have recognized some version of one or both of these privileges - solely on federal grounds.

This is exemplified by two decisions issued since this case was placed on the Court's docket.

> The constitutional privilege for expressions of opinion was identified in Gertz v. Robert Welch.."
>
> "We deal with a privilege that derives from the Constitution not from state law." (Lewis v. Time U.S. Court of Appeals, Ninth Circuit, No. 82-4026, July 12, 1983)
>
> "Gertz' pronouncement that the First Amendment confers an absolute privilege on expressions of opinion stands as one of the cardinal principles of free speech and press. Yet, as my brief review of pertinent Supreme Court defamation cases illustrates, it is a principle on whose implementation the Court has been virtually silent." (Ollman v. Evans, U.S. Court of Appeals, District of Columbia Circuit, No. 79-2265, Aug. 5, 1983)

Consideration of this question is particularly important in this case. Demurrers to four causes of action were sustained because of this erroneous interpretation of the Gertz decision; it was the sole authority for recognition of an absolute privilege. The demurrers would not have been sustained

under pre-Gertz California law because it recognized only a qualified privilege for statements of opinion and petitioner had adequate evidence of malice to defeat the privilege.

There is no reason to conclude that the Times decision required a change in California law as it pertained to statements of opinion. California was one of the 'minority' states that had adopted a qualified privilege for libelous statements of fact prior to the New York Times decision. Its fair comment privilege reflected this difference from the 'majority' states. A defendant did not have to show the truth of facts upon which an opinion was based in order to qualify for the fair comment privilege. To defeat the privilege the plaintiff was required to prove that the defamatory comments were published primarily because of hatred and ill-will rather than because of a desire to enlighten the public.

"Comments, opinions and criticisms may be defamatory even though based upon true or privileged statements of fact. The publisher is liable unless the comments themselves are privileged."

"Statements of opinion, although of a defamatory nature, are privileged in California..."

"Defendants could legitimately comment upon and criticize.... even though the criticism adversely affected...reputation." "But this defense of fair comment is not absolute. There is no absolute right to destroy a person's name and reputation by publication of defamtory criticisms and opinions .... The protection which the law affords to those who would comment or criticize extends only to comment which is 'fair', not in the sense that it must be reasonable or moderate, but in the sense that it must be published, in part at least, for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff." "Allegations that the comments were not published primarily for a bona fide purpose, but were published <u>because of malice</u>, renders the publisher liable if his comments, opinions or criticisms are defamatory." (<u>Maidman v. Jewish Publications</u> 54 C.2d, 649,651,652,653, 1960)

Pre-Times California law was equally clear on the republication issue.

> "It may have been a true report of what these women told the reporter, but that is not the truth which will justify a publisher. If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would constitute no defense to C, for it would be but a repetition by him of a slanderous charge." (Gilman v. McClatchy 111 Cal. 612, 1896)

In this case the Court of Appeal recognized a privilege which absolutely immunizes the press from liability for republication of libels, again, solely on federal grounds. It is in direct opposition to long established California law.

Under these circumstances the Court should decide the federal issue.

> "It appears to us that the decision rested solely on federal grounds....In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should

> so declare." (Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 568, 1976)

SECOND QUESTION PRESENTED FOR REVIEW

The second question presented for review is whether the First and Fourteenth Amendments prohibit states from extending absolute immunity to press defendants in public person defamation actions where actual malice is shown.

Respondents argument against consideration of this question is,

> "Petitioner FISHER's second Question Presented is not supported by the record or the decision below." (Respondent's Brief in Opposition, page 7)

It is true that the Court of Appeal affirmed the orders granting summary judgments and sustaining demurrers purely on federal grounds.

Petitioner hasn't found any authority explicitly recognizing a positive First Amendment interest in reputation. However, the factual record of this case illustrates

how erroneous it is to assume that First Amendment interests always favor defendants in public person defamation actions, and this Court has stated that it is not improper to seek a new constitutional interpretation.

> "It is not uncommon or improper... to suggest the abandonment, modification or refinement of existing constitutional interpretation.." (Herbert v. Lando, 441 U.S. 169)

THIRD QUESTION PRESENTED FOR REVIEW

The third question presented for review is whether section 48a of California's Civil Code is unconstitutional.

Respondents' argument against consideration of this question is that there were other grounds upon which the summary judgments could have been sustained.

> "Petitioner Fisher's third Question Presented requests this Court to invalidate a State statute, California Civil Code 48a, without any support in the record for such drastic action by this Court or reasoned basis requiring Supreme Cour review. It is well-settled that this Court will not pass

> on the constitutionality of an act of the State legislature where other grounds are available for disposition of the issues of the case. FISHER admits that the New York Times v. Sullivan rule requires her to show actual malice. Thus, it is unnecessary for this Court to even address the constitutionality of California Civil Code 48a." (Respondent's Brief in Opposition, pages 7,8)

The implication is that FISHER lacked sufficient evidence of actual malice to withstand respondents' motions for summary judgment. This is contrary to the assessment of the Appellate Court.

> "The fourth and fifth causes of action challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles she only seeks to recover the 'special' damages limited to loss of the future benefits of her lost elective office. Since we hold these damages are not recoverable, summary judgments on the fourth and fifth causes of action were proper."(138 Cal.App.3d 643)

In its discussion of another cause of

action, which was based on publication of a similar statement, the Appellate Court cited evidence of actual malice sufficient to reverse summary judgment.

> "Scott-Blair...continuously followed Fisher's campaign from before the June 1977 strike, and knew he earlier falsely reported Fisher had actually marched with the teachers during their illegal strike and knew Fisher publicly denied favoring teachers' strikes (See San Diego Union editorial, 10/17/77, "Uplavici Syndrome Strikes Again..."(138 Cal.App.3d 644)

There is no indication that Fisher had insufficient proof of actual malice.

Dated: September 17, 1983

Respectfully submitted,

Julie Fisher

JULIE FISHER,
Petitioner